

TREATING PERSONS AS ENDS IN THEMSELVES: THE LEGAL IMPLICATIONS OF A KANTIAN PRINCIPLE

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I. INTRODUCTION

In one of the most stirring passages in modern ethics, Immanuel Kant famously enjoins: "act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."¹ Precisely what Kant means here, however, is not entirely clear.² More than one interpretation of this formula is possible.³ But the importance of Kant's "formula of ends" in modern moral philosophy is impossible to deny.⁴

What this basic moral principle implies for the law, and whether the law properly respects this basic moral principle, are the concerns of this article. Kant saw important differences be-

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1. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 38 (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785) [hereinafter KANT, *GROUNDWORK*]. This and related formulations have been quoted and discussed frequently. See, e.g., Thomas E. Hill, Jr., *Humanity as an End in Itself*, 91 *ETHICS* 84, 84 (1980).

2. See KANT, *GROUNDWORK*, *supra* note 1, at 96; ROBERT PAUL WOLFF, *THE AUTONOMY OF REASON: A COMMENTARY ON KANT'S GROUNDWORK OF THE METAPHYSICS OF MORALS* 175 (1973) (stating that it is very difficult to tell what Kant means by the injunction to treat humanity as an end in itself); Eric Rakowski, *Taking and Saving Lives*, 93 *COLUM. L. REV.* 1063, 1074 (1993) (describing Kantian formulation as seeming "to label the point rather than explain it").

3. See Wendy J. Gordon, *Truth and Consequences: The Force of Blackmail's Central Case*, 141 *U. PA. L. REV.* 1741, 1761 n.97 (1993) (referring to Kant's formulation as "open to many differing interpretations"); Hill, *supra* note 1, at 84.

4. See William Ewald, *Comparative Jurisprudence (1): What Was it Like to Try a Rat?*, 143 *U. PA. L. REV.* 1889, 2001 (1995) (describing this formulation of the Kantian Categorical Imperative as "the most important and influential for the philosophy of law"); Hill, *supra* note 1, at 84; David Morris Phillips, *The Commercial Culpability Scale*, 92 *YALE L.J.* 228, 254 n.110 (1982) (quoting ALAN DONAGAN, *THE THEORY OF MORALITY* 229 (1977) and describing this version of the Categorical Imperative as "the fundamental principle of common morality").

tween the spheres of law and morality.⁵ He recognized that it is difficult, if not impossible, for the law to coerce us into doing the morally right thing from the right motive.⁶ The law should, however, take proper account of the Kantian formula.

Part II discusses Kant's formula of ends. The remaining sections test the adequacy of the law's response to Kant's formula. This article does not refer to every area of the law that embodies or conflicts with the Kantian formula, but it does, however, discuss several areas of the law that support the Kantian principle and other areas that do not.

In particular, this article focuses on deterrence theories of criminal punishment, the law of commercial appropriation of likeness or identity, sexual harassment, human cloning, and the law of rescues.⁷ The law of rescues brings to the forefront what others have labeled the positive, or affirmative, duty side of the Kantian formula of ends. Next, the article considers what this positive dimension of Kant's formula of ends tells us about the law of welfare and the right to education.⁸

Ultimately, the article concludes that the formula's encounter with the law helps to further clarify the strengths and limits of the possible interpretations of the formula. More importantly, Kant's formula of ends, especially in its positive dimensions, casts

5. See, e.g., IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 31 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797) [hereinafter KANT, *METAPHYSICS*] (stating that the law cannot choose an end for a person, even when it requires or forbids particular acts); see also HANNAH ARENDT, *LECTURES ON KANT'S POLITICAL PHILOSOPHY* 8 (Ronald Beiner ed. 1982) (suggesting that "if we want to study the philosophy of law in general, we certainly shall not turn to Kant"); Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1026 n.29 (1997) (concluding that Kant does not require this principle to include fidelity for a law to be valid, notwithstanding the intuitive appeal of the principle in at least some contexts); Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1713-14 n.52 (1995) (discussing the independence of Kant's moral theory from his legal theory, but maintaining the value of considering Kant's moral theory in grounding our legal duties); Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 473 (1987) (stating that "[s]uch Kantianism as exists in contemporary legal thought takes its bearings from Kant's ethical rather than from his legal philosophy").

6. See David Cummiskey, *Kantian Consequentialism*, 100 ETHICS 586, 604-05 (1990) (discussing KANT, *METAPHYSICS*, *supra* note 5, at 31). Certainly one can be legally required to provide certain opportunities for another person, or to promote the other person's rational development, without subjectively respecting that other person. The law often requires us to do what some remain unwilling to freely do, as Kant recognizes. See *id.*

7. See *infra* Parts IV.A-E.

8. See *infra* Part IV.F.

serious doubt on the moral adequacy of the current law of welfare and education. The law can and should do more to promote the development of the rational capacities we all possess, regardless of our individual economic circumstances. Thus, the Kantian formula of ends is not simply an Enlightenment milestone, but an important and unmet challenge to the law.

II. CLARIFYING THE KANTIAN FORMULA: SOME PRELIMINARY ISSUES

Kant's formula of ends is one of several formulas that Kant believes to be different expressions of the same underlying idea.⁹ The alternative formulas focus on other dimensions of morality.¹⁰

This article focuses on Kant's formula of ends.¹¹ A close look at this formula raises several interpretive issues. First, the formula of ends discusses how one should "treat" someone or something. The idea of "treating" requires clarification. Treating someone or something in a particular way may suggest that someone has taken some affirmative action, or it may mean that someone passively treats a person with disdain or even contempt.

In order to treat "humanity" in some particular way, humanity must be defined. In discussing humanity, Kant introduces the idea of "personhood"—one's own person and the personhood of someone else—as closely related to humanity. What is the relation between humanity and personhood? Whatever the object of our treatment is, that object must be treated not merely as a means, but, presumably in the same action, also as an end.

Most people appreciate the idea of treating someone as a means, and perhaps even as a mere means. Likewise, most people are familiar with the idea of treating someone as an object. Is treating someone as an object always the same as treating some-

9. See KANT, *GROUNDWORK*, *supra* note 1, at 103.

10. See *id.* at 88–101. The alternative formulations of the Categorical Imperative ask us, in turn, to assume that the maxim or principle underlying one's contemplated action, through one's will, become universalized as a law of nature; to assume that one's will is, through the maxims underlying one's actions, thereby generating universal law; or to assume that through one's maxims, one is making law as a member of a sort of republic or realm of ends. This article does not focus on these alternative formulas.

11. This formulation appears as only one among the four alternative formulations of what Kant refers to as the Categorical Imperative. See, e.g., Hill, *supra* note 1, at 84.

one merely as a means? Are people sometimes treated as mere objects, but not as a means toward any goal? To answer these questions, this article must clarify the difference between treating someone as a means and treating someone merely as a means. Kant believes this distinction depends on whether the relevant "humanity," "person," or "personhood" has been treated as an end, as well as a means. While evocative, it is not clear language. People do not commonly refer to a person as an end, or as an end in herself. Therefore, this article must clarify how a person is an end, a goal, or an aim.

In piecing together a plausible understanding of Kant's formula of ends, this article makes no claim to have arrived at the understanding that Kant intended. Any such claims are hopelessly indeterminate. In any event, this article's goal is to construct a useful understanding of Kant's formula of each, rather than one that would have met with Kant's approval.

Similarly, this article does not assess the ultimate merits of Kant's formula of ends as moral philosophy. The article is limited to relying on the intuitive appeal, evocativeness, power, influence, and popularity of the Kantian formula of ends in critiquing the law.

Perhaps the leading current exponent of broadly Kantian moral theory is John Rawls. Rawls offers the following view of Kant's use of the term humanity:

Kant means by humanity those of our powers and capacities that characterize us as reasonable and rational persons who belong to the natural world These powers include, first, those of moral personality, which make it possible for us to have a good will and a good moral character; and second, those capacities and skills to be developed by culture: by the arts and sciences and so forth.¹²

Humanity, for Kant, thus focuses crucially on people's rational capacities,¹³ including their ability to make rational choices regarding what is deeply valuable or worthy.¹⁴ If people have the capacity to make rational moral choices freely, autonomously, and

12. JOHN RAWLS, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY 188 (Barbara Herman ed. 2000).

13. See CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 110 (1996) ("In the *Groundwork*, Kant interchanges the terms 'humanity' and 'rational nature.'").

14. See *id.* at 114.

self-originatingly,¹⁵ beyond being pulled about mechanically by the tugs of nature, that capacity will be the source and embodiment of moral worth, dignity, and their status as ends in themselves.

Thus, to the extent that they are capable of free and autonomous thinking and of genuine moral deliberation,¹⁶ people possess dignity, or worth, as ends in themselves.¹⁷ As Rawls suggests, if mankind can avoid having natural and social desires dictating their actions, and if people are capable of rational moral willing, they are ends in themselves.¹⁸

For Kant, the existence of the developed or undeveloped capacity for rational willing is not a matter of degree among persons. The bare existence of this capacity, and people's existence as ends in themselves, does not vary from person to person.¹⁹ It is therefore, among persons, a matter of commonality rather than distinction.²⁰ Professor Allen Wood writes that for Kant, "[t]he worth of all rational beings is *equal*."²¹ A person born to poverty is not lower on some scale of crucial moral worth than a person born to wealth. This is not to say, of course, that people are equal in the opportunities society gives them to develop their rational capacities. Nor is it to say that the bare minimal capacity for rationality is all that matters.

To say that people are equal in basic worth differs from saying that their worth as humans is incomparable or incommensurable. Equality is not incomparability. It is, for example, more tempting to somehow trade off one person for another if they are considered

15. See BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 238 (1993).

16. See HENRY E. ALLISON, *KANT'S THEORY OF FREEDOM* 221 (1990).

17. See HERMAN, *supra* note 15, at 237.

18. See RAWLS, *supra* note 12, at 196. Raising a terminological issue, Allen Wood has observed that "[s]trictly speaking . . . Kant ascribes dignity not to 'humanity' but to 'personality,' that is, not to rational nature in general but to rational nature in its capacity to be morally self-legislative." ALLEN W. WOOD, *KANT'S ETHICAL THOUGHT* 115 (1999). Some of the discussions above simply focus on humanity insofar as it is capable of rational moral willing. This article sets Wood's distinction aside.

19. See THOMAS E. HILL, JR., *DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY* 61 (1992).

20. See *id.* Despite this, Kant does not recognize humanity, or the capacity for rational moral legislation, in non-human animals. See *id.*; see also IMMANUEL KANT, *LECTURES ON ETHICS* 239 (Louis Infield trans. 1963) (1930). For a discussion of intermediate possibilities between persons and things, see, e.g., ONORA O'NEILL, *CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY* 138 n.11 (1989).

21. WOOD, *supra* note 18, at 132.

basically "equal." People may be less tempted, however, to trade off one person for another if each person is of literally irreplaceable or incomparable value.

Of course, Kant cannot escape from difficult cases of classification. For Kant, mature members of our species, who are not severely mentally incapacitated, count among rational humanity.²² But inevitably there are difficult cases of classification. Vulcans, though, may be mildly gratified to learn that Kant's category of "humanity" is not exclusive to members of the human species. Any species whose capacity for rational moral willing meets Kant's criteria may be recognized as dignified ends in themselves.²³

As an end, worth in one's self is thus equal, or more precisely, incomparable among persons, as well as being objective, intrinsic, and absolute. As Professor Roger Sullivan observed, for Kant, "[r]espect is an attitude due equally to *every* person, . . . regardless of social position, occupational role, learning, wealth, or any other special qualities or talents he or she may or may not possess."²⁴ Respecting people is also not a matter left to anyone's discretion or preference.

This basic dignity attaches because of mankind's mere capacity for rational moral willing, and not because a person actually does the right thing or acts from the right motive.²⁵ Kant, of course, recognizes a crucial moral difference between good and bad conduct. Put simply, good conduct expresses proper respect for humanity, whereas bad conduct expresses disrespect or contempt.²⁶ Failing to respect humanity as an end in itself uses that absolute

22. See *id.* at 119. Kant recognizes a moral duty to restore humanity where we can. See *id.* at 144 ("We surely would dishonor rational nature if we did not cherish its development in children or failed to strive for its recovery in men and women who have temporarily lost it.").

23. See *id.* at 119.

24. ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 197 (1989). This is not to suggest that Kant did not attach moral and legal weight to various sorts of social hierarchies in other respects. See, e.g., WOOD, *supra* note 18, at 138 ("[T]he equality of all rational beings does not entail that they must be treated exactly alike in any particular respect.").

25. See SULLIVAN, *supra* note 24, at 120; see also KORSGAARD, *supra* note 13, at 124; WOOD, *supra* note 18, at 120 ("[R]ational beings cannot be ends in themselves only insofar as they are virtuous or obedient to moral laws.").

26. See SULLIVAN, *supra* note 24, at 120.

worth as a means to some goal that has a mere "price,"²⁷ as distinguished from dignity. As well, "[w]henever we immorally cater to our inclinations, we violate our integrity by treating ourselves and others as mere things, as of only instrumental value."²⁸ But Kantian basic respect is not owed to persons only when they do the right thing.²⁹

Kant has no general objection to using people, or to using them as a means. Life could hardly be possible otherwise. The Kant scholar H. J. Paton points out that "[e]very time we post a letter, we use post-office officials as a means, but we do not use them simply as a means."³⁰ The critical difference is between treating a person *merely* as a means, and treating a person as a means and at the same time as an end.³¹ This is partly a matter of act and of intention, and further, a person's intentions may not always be clear in the realm of morality or of law.

It is crucial to think about what might be called the affirmative dimension of Kant's formula, as distinct from its merely negative or passively fulfilled dimension. The Kantian formula of ends cannot always be fulfilled by keeping our distance, or by indifference to other rational agents or potential rational agents. The Kantian formula of ends requires not only a refusal to murder, but a willingness to actively participate and assist others in affirmative mutual support.³²

Therefore, we must go beyond mere negative duties of not interfering with refraining from injury; we must act affirmatively to help others.³³ Kant holds that our moral duty is, in part, to seek to perfect our own moral virtue.³⁴ With regard to others, however,

27. WOOD, *supra* note 18, at 143; see KANT, *supra* note 1, at 102. Query: may there be priceless, incomparable, incommensurably worthy art?

28. SULLIVAN, *supra* note 24, at 200. Mere things are said to have only "extrinsic, conditional, and subjective value." *Id.* at 195.

29. See *id.* at 203-08.

30. H. J. PATON, *THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY* 165 (4th ed. 1963).

31. See *id.*

32. See, e.g., HILL, *supra* note 19, at 87.

33. See SULLIVAN, *supra* note 24, at 194.

34. See *id.* at 194, 200 ("[O]ur positive duties to ourselves concern mainly our own moral perfection . . . whereas our positive duties to others concern mainly their happiness."); WOOD, *supra* note 18, at 142 ("[T]his is how we should understand the worth of the ends Kantian ethics holds to be obligatory: our own perfection and the happiness of others.").

our moral duty is not to paternalistically try to perfect their own moral virtue.³⁵ Rather, in light of their own dignity and moral autonomy, one's moral duty toward others is primarily to help promote their happiness in their own way, through sharing in their own projects within the scope of the moral law and other constraints.³⁶

The moral law and other considerations sets limits on our duty to assist others in their projects. Kant sensibly recognizes that the duty of respect and benevolence that we morally owe others cannot be determined by a precise universal rule, because context and circumstance play important roles.³⁷ The exercise of judgment is necessary to decide particular cases.³⁸

In such decisions, both "the extent of our resources and the severity of the needs of others"³⁹ should be primary considerations. Kant, as a person of his own time and culture, suggests that the duty of benevolence diminishes with distance,⁴⁰ and that "differences in social rank, age, sex, health, economic situation, education, and even personality traits may all be legitimately taken into account."⁴¹ Of course, all persons, regardless of status, must still be affirmatively respected as ends in themselves.⁴²

As we think about the scope and limits of our duty of respect and benevolence for others, it is important to bear in mind that Kant is not thinking of what is especially morally admirable, morally optional, or saintly. The Kantian formula of ends imposes a genuine moral duty: "what is commanded . . . is that each moral

35. "[O]ur duty to ourselves is to seek as an end our own natural and moral perfection but not our happiness; and that our duty to others is to seek as an end their happiness but not their perfection." PATON, *supra* note 30, at 172.

36. See SULLIVAN, *supra* note 24, at 205, 207; WOOD, *supra* note 18, at 151.

37. See KANT, METAPHYSICS, *supra* note 5, at 156; WOOD, *supra* note 18, at 150.

38. See KANT, METAPHYSICS, *supra* note 5, at 156, 161; SULLIVAN, *supra* note 24, at 208.

39. SULLIVAN, *supra* note 24, at 208

40. See *id.* ("[W]e are obligated to show a greater benevolence to those closest to us."). "Closest" may be defined by the circumstances to include "physical proximity, emotional closeness," familial ties or cultural or ideological similarities. *Id.*

41. *Id.* Given the Kantian logic of human dignity, even if it is perversely thought appropriate to first assist persons of high "social rank," it would be ultimately indefensible to actively or passively stunt the development of the basic rational capacities latent within persons who seek an education.

42. See *id.* at 203.

agent strive to preserve and promote rational nature in all persons . . . affected by his actions, not just in himself."⁴³

The duty of promoting others' projects, or their happiness, is of course an "imperfect" duty.⁴⁴ It is possible for us, for example, not to murder anyone, but no human holds the power to educate every rational or potentially rational person. The first duty is in this sense perfect, the second imperfect. Determining that a duty is imperfect does not, however, reveal much about the scope or depth of that duty, or convert it into something less than a duty. Even an imperfect moral duty is more than a suggestion and can be reasonably enforced through the law.

The positive duty of benevolence, according to Kant, arises from our ultimately inescapable vulnerability and lack of self-sufficiency as persons. As Onora O'Neill observes, "[a]mong vulnerable beings agency can be secure for all only when agents act to support as well as to respect one another's agency."⁴⁵ In some cases, the line between respecting agency and supporting agency will be hopelessly blurred. Given our vulnerability and inescapable mutual dependencies, we must to some degree adopt the goals and priorities of others as our own if we are to fully recognize their agency, or their potential agency.⁴⁶ The Kantian positive duty does not invite general paternalism. Positive assistance and respect, in this sense, are more a matter of providing opportunities and actively removing obstacles to agentic development and the morally permissible goals set by other persons.⁴⁷

Our imperfect moral duty to promote others' happiness must, in crucial respects, overlap and correspond to the basic duty to treat persons as ends. We must not fall short in fulfilling these duties, whether out of habit, indifference, failure of imagination, or selfishness. Again, the limits on such duties are controversial and not easily drawn. Even if we could pinpoint the proper scope and limits of our moral duties, it would not correlate to the scope and limits of our proper legal duties. And collectively, our indi-

43. PAUL GUYER, *KANT ON FREEDOM, LAW, AND HAPPINESS* 199 (2000).

44. See PATON, *supra* note 30, at 172 ("We transgress perfect duties by treating any person merely as a means. We transgress imperfect duties by failing to treat a person as an end, even though we do not actively treat him merely as a means."); SULLIVAN, *supra* note 24, at 207 ("The positive obligation of benevolence is a wide and imperfect duty.").

45. O'NEILL, *supra* note 20, at 140.

46. See *id.*

47. See Hill, *supra* note 1, at 97.

vidual legal duties likely would not immediately translate into a clear understanding of the scope and limits of our collective duty as members of a state through government action.

Yet individually, and as a society, mankind must address these matters. In fulfilling their duty, people should begin with what should count as a justifiable limitation on our moral duty to assist others. It is clear that good faith judgment⁴⁸ and sensitivity to circumstance will be required.⁴⁹ Beyond this, at least where no special relationships exist, as that of bodyguard and employer, Kant's formula suggests that "we may refrain from helping only if such action would place our own rational action in jeopardy."⁵⁰

This seems to be a reasonably demanding guide, but we might wonder whether only effects on the benefactor's rationality are relevant since our lives have other important dimensions.⁵¹ Even if one focuses on the benefactor's own rationality, and sets aside all effects on third parties, we are still left with a range of stronger and weaker interpretations of the Kantian assistance requirement. Surely one is not bound to, in effect, sacrifice his own life for the benefit of strangers.⁵² Are others supposed to, self-defeatingly, sacrifice their own lives for us? Who would be left?

Professor Barbara Herman articulates a defensible interpretation: "the requirements of beneficence do not interfere with what is necessary for one to continue to live a human life; they also do not protect all that one may find necessary to live as one wants."⁵³ This interpretation of the Kantian beneficence duty inescapably requires a substantial degree of personal sacrifice. Presumably, the degree of personal sacrifice is in some rough proportion to mankind's resources and the genuinely fulfillable basic needs of others, which bears on their happiness and rational development.

Kant's libertarian and anti-paternalist element again call upon people not to force their version of the rational and the good down

48. See *supra* note 38 and accompanying text.

49. See *supra* note 37 and accompanying text.

50. HERMAN, *supra* note 15, at 67.

51. See Hill, *supra* note 1, at 98–99.

52. See HERMAN, *supra* note 15, at 67.

53. *Id.*; see also KANT, METAPHYSICS, *supra* note 5, at 202 ("[H]ow far should one expend one's own resources in practicing beneficence? Surely not to the extent that he himself would finally come to need the beneficence of others."). Kant's concern is not only for this sort of loose contradictoriness, but for what he takes to be government injustice in generating or expanding inequalities of wealth and resources. See *id.* at 202–03.

the throats of others. People must generally promote the chosen projects of others, whether they would have chosen such projects themselves, at least as long as their projects "are not manifestly foolish or incompatible with the moral law."⁵⁴ Presumably, there cannot be a general moral requirement that subverts or directly promotes subversion of the moral law.⁵⁵ A desire for a basic, effective, rationality-developing education, however, hardly counts as an immoral or arbitrary project.

Ultimately, we are morally bound to assist others in realizing or developing their projects because it is only in that way that we "exhibit proper esteem for their worth as rational beings."⁵⁶ In particular, "we surely would dishonor rational nature if we did not cherish its development in children or if we failed to strive for its recovery in men and women who have temporarily lost it."⁵⁷ The duty of benevolence is again bottomed in respect for persons as ends in themselves.

The actual exercise and development of rational powers, unlike their mere presence or utter absence, is clearly a matter of degree. The moral duty of beneficence toward others must take into account this capacity for development. Rational nature is not properly honored by barely bringing it into existence or defending it only from utter extinction within a person. In order to properly cherish the power of rational choice in others, mankind must recognize that another person's choice is fully human only when that choice is fully rational and reasonable,⁵⁸ or at least made under conditions permitting such a fully rational choice. Respect for ra-

54. PATON, *supra* note 30, at 173.

55. Robert Paul Wolff argues that, at this point, we are in the process of trying to flesh out what the Kantian formula means with respect to our actions toward others. We seem to need an independent way to determine whether someone else's project violates the Kantian moral law, although we might have hoped that the Kantian formula alone would allow us to do that. *See* WOLFF, *supra* note 2, at 176. One possible solution would be to use the alternative Kantian formulas, including perhaps the "universal law" version of the Categorical Imperative, to determine which projects of other persons violate the moral law. No single version of Kant's alternative formulas needs to be established first—they could be mutually supportive of one another. And the lesson of Kant is that mankind must be keenly aware of the possibility that their local cultural habits and prejudices may come disguised as violations of a supposed universal moral law.

56. WOOD, *supra* note 18, at 149.

57. *Id.* at 144.

58. *See* KORSGAARD, *supra* note 13, at 123.

tionality aims to permit its development and flourishing whenever possible.⁵⁹

In this regard, one might think of Kant's formula of ends as a contribution toward a theory of need-fulfillment. Kant does not concern himself with those needs that bear upon mere biological persisting, nor does he concern himself with alleged needs that reflect merely sophisticated and pervasive commercial marketing. Instead, Kant concerns himself with those needs "that must be met if he [a person] is to function (or continue to function) as a rational, end-setting agent."⁶⁰

Kant's understanding of human needs, insofar as they bear on the duty of beneficence, must certainly account for biological needs.⁶¹ However, Kant extends his understanding of the scope of needs to "education and culture, as well as for various conditions essential for the development and exercise of our moral sensibility and conscience, and for the powers of reason, thought, and judgment."⁶²

This article further discusses the scope, strength, and limits of moral and legal duties of assistance, at the level of individuals and groups in Part IV. For the moment, this article will apply the Kantian formula of ends, as a society, to the case of Thomas Hardy's character of Jude Fawley,⁶³ who supports himself through stone masonry, but who aspires to his natural place among the students of Christminster:

Only a wall divided him from those happy young contemporaries of his with whom he shared a common mental life; men who had nothing to do from morning till night but to read, mark, learn, and inwardly digest. Only a wall—but what a wall! . . . He was a young workman in a white blouse, and with stone-dust in the creases of his clothes; and in passing him they did not even see him, or hear him, rather saw through him as through a pane of glass at their familiars beyond.⁶⁴

59. See *infra* Part IV.F.

60. HERMAN, *supra* note 15, at 67.

61. See RAWLS, *supra* note 12, at 174.

62. *Id.* at 174–75.

63. See generally THOMAS HARDY, JUDE THE OBSCURE (Cedric Watts ed., Broadview Press Ltd. 1999) (1895).

64. *Id.* at 121.

Socially constructed economic barriers to human rational fulfillment are generally incompatible with the imperfect duty to aid, and with the fundamental formula of ends itself.

III. A BRIEF INTERLUDE: THE KANTIAN FORMULA, THE GOLDEN RULE, AND CLASSIC UTILITARIANISM

Before refining and applying the Kantian formula in legal contexts, it is useful to contrast the Kantian formula with both the familiar Golden Rule and the basic idea underlying classical utilitarianism. This clarifies the Kantian formula of ends and the legal issue discussions to follow.

Kant refers to the negative formulation of the Golden Rule in a footnote immediately following his discussion of the formula of ends.⁶⁵ He argues briefly for the superiority of his formula.⁶⁶ He notes that self-sufficient persons might prefer to be left without assistance if that relieved them of any duty to assist others,⁶⁷ and that the Golden Rule might be relied on by justly convicted persons who would prefer not to be criminally sentenced.⁶⁸ He refers to the Golden Rule principle as "trite"⁶⁹ or, at best, derivative from his own formulation.⁷⁰ The Golden Rule is thought by Kant to leave too large a role for anyone's mere natural and arbitrary inclinations and personal advantages.⁷¹

Actually, indeterminacy in application affects both Kant's formula and the Golden Rule, as discussed in Part IV. It is not clear that the case of the self-sufficient person who declines both to help and to be helped is especially embarrassing for the Golden Rule. In some ways, the Golden Rule asks the self-sufficient person how he or she would wish to be treated in circumstances like those of the person who needs, and is asking for help.

As for the case of the convict who wishes to be set free and who argues that the sentencing judge would wish to be freed, whether innocent or guilty, the response is murkier. Assume that a guilty

65. See KANT, *GROUNDWORK*, *supra* note 1, at 38.

66. See *id.*

67. See *id.*

68. See *id.*; see also Hill, *supra* note 1, at 89.

69. KANT, *GROUNDWORK*, *supra* note 1, at 38.

70. See *id.*

71. See RAWLS, *supra* note 12, at 199.

sentencing judge would not want to be sentenced. It remains true that a sentencing judge who applies the Golden Rule may also consider the wishes of other persons affected by the sentencing decision, including the victim and perhaps society in general.

Depending on interpretation, there is a sense in which the Golden Rule and Kant's formula of ends may closely parallel one another. The practical meaning of Kant's formula must be determined before the question of their differences⁷² and similarities can be answered.⁷³ In particular, the Kantian formula cannot be deemed "broader in scope and more demanding"⁷⁴ than the Golden Rule until the sorts of legal problems addressed in Part IV are resolved.⁷⁵

Treating persons as ends in themselves may also yield results that differ from whatever counting process takes place in classical utilitarianism. There is certainly more than one way to interpret Kant's formula,⁷⁶ and in some interpretations, some broadly utilitarian elements may be present.⁷⁷ But Kant's formula cannot be reduced to an expression of classical utilitarianism. The Kantian formula of ends cannot be bound by classical utilitarian calculation.⁷⁸ As John Rawls has written, "by viewing people as subjects of desires and inclinations and assigning value to their satisfac-

72. For a brief discussion, see Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 348 (1998).

73. See *id.*

74. Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859, 1867 (2000) (referring to the understanding of Kant himself); see also Nelson Lund, *The President as Client and the Ethics of the President's Lawyers*, 61 LAW & CONTEMP. PROBS. 65, 68 (1998) (referring to the Kantian formula as "the most rigorous secular formulation"); Louis E. Wolcher, *The Paradox of Remedies: The Case of International Human Rights Law*, 38 COLUM. J. TRANSNAT'L L. 515, 559-61 (2000) (discussing Walter Benjamin's suggestion that Kant's formula is too weak, in that one ought never use anyone in any respect, even partially, as a means).

75. For a more radical challenge to the Kantian principle, consider the plea of Thérèse of Lisieux: "I do not want to be a saint by halves. . . . I fear only one thing—that I should keep my own will." SAINT THÉRÈSE OF LISIEUX, *THE STORY OF A SOUL* 26 (John Beevers trans. 1957) (1898).

76. See *supra* note 3 and accompanying text.

77. See R.M. HARE, *SORTING OUT ETHICS* 147 (1997); Cummiskey, *supra* note 6, at 587, 599.

78. See, e.g., Hill, *supra* note 1, at 87-88 (describing Kant's formula as incompatible with utilitarian manipulation of persons for the sake of the broader general welfare); see also Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1123-24 (1983).

tion as such, (classical) utilitarianism is at odds with Kant's doctrine at a fundamental level."⁷⁹

Nor is the Kantian formula subject to anything like classical utilitarian calculation.⁸⁰ At some point, the dignity of an end in itself and the process of mere calculation are incompatible. The ultimate irreconcilability of utilitarian calculation and Kantian dignity is well expressed by the anti-utilitarian Charles Dickens in *Hard Times*:

So many hundred Hands in this Mill; so many hundred horse Steam Power. It is known, to the force of a single pound weight, what the engine will do; but not all the calculators of the National Debt can tell me the capacity for good or evil, for love or hatred, for patriotism or discontent, for the decomposition of virtue into vice, or the reverse, at any single moment in the soul of one of these its quiet servants, with the composed faces and the regulated actions. There is no mystery in it; there is an unfathomable mystery in the meanest of them, for ever.⁸¹

Let us turn, then, to the mystery of human dignity and the status of being an end in oneself, as that status is respected or disrespected in the legal sphere.

IV. KANT'S FORMULA OF ENDS AND THE LAW: SOME CRUCIAL CASES

A. Criminal Deterrence Theories of Punishment and Treating Persons as Ends in Themselves

Kant's formula of treating persons as ends in themselves, as elaborated above, does not, by itself, imply some single theory of criminal punishment. It is open to doubt whether Kant's work, as

79. RAWLS, *supra* note 12, at 198. Kant certainly does not, whatever we may think of his particular judgments in this regard, place all desires on the same moral plane. *See, e.g.*, KANT, *METAPHYSICS*, *supra* note 5, at 180 ("On Stupefying Oneself by the Excessive Use of Food or Drink"). The discussion need not be bound by any of Kant's own particular judgments that do not follow from the most satisfactory interpretation of Kant's formula.

80. *See* KANT, *METAPHYSICS*, *supra* note 5, at 156 (indicating that the Kantian formula is to operate at the level of maxim or principle, rather than as a precise determiner among possible choices, and that some degree of contextual judgment and latitude is inescapable).

81. CHARLES DICKENS, *HARD TIMES* 56 (Fred Kaplan and Sylvère Manod eds., W.W. Norton & Company, Inc., 3d ed. 2001) (1854).

a whole, presents a clear and unified theory.⁸² Our concern, however, is only with the implications Kant's formula of ends may have for punishment.

Kant himself addresses the logic of criminal punishment in the following way:

Punishment by a court . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime*. For a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things; his innate personality protects him from this . . .⁸³

Contemporary American courts authoritatively cite these sentiments.⁸⁴ What Kant means, and what his remarks in this context really amount to, however, are not entirely clear.

Deterrence theories of punishment, by way of contrast, emphasize the operation of a criminal punishment as a threat or incentive intended to influence future behavior.⁸⁵ Optimal deterrence levels are those that, all costs accounted for, maximize social welfare.⁸⁶ Thus, at the very least, there is a difference in emphasis between deterrence theories and Kant's formula of ends in the sphere of punishment.

It is, however, difficult to detect any unbridgeable gulf between Kant's formula and deterrence theories. Kant's formula of ends does not rule out deterrence, or any other principle but retribution, as a vital, perhaps even primary, justification of punish-

82. See Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 509 (1987) (questioning Kant's theories on crime and punishment).

83. KANT, *METAPHYSICS*, *supra* note 5, at 105.

84. See, e.g., *United States v. Blarek*, 7 F. Supp. 2d 192, 200-01 (E.D.N.Y. 1998) (Weinstein, J.); *State v. Gardner*, 947 P.2d 630, 634-35 (Utah 1997).

85. See, e.g., ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 38 (reprint ed. 1986) ("[B]y 'general deterrence,' we mean the effect that a threat to punish has, in inducing people to refrain from prohibited conduct."); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 415 (1999) ("[B]y 'deterrence' I intend to refer broadly to the consequentialist theory, propounded by Bentham and refined by his economist successors, that depicts punishment as a policy aimed at creating efficient behavioral incentives."). See generally John Andenaes, *General Prevention—Illusion or Reality*, in *THEORIES OF PUNISHMENT* 138, 142 (Stanley E. Grupp ed. 1971); Gordon Hawkins, *Punishment and Deterrence: The Educative, Moralizing, and Habituated Effects*, in *THEORIES OF PUNISHMENT*, *supra*, at 163, 165, 172; Karl F. Schuessler, *The Deterrent Effect of the Death Penalty*, in *THEORIES OF PUNISHMENT*, *supra*, at 181, 182; Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943 (2000).

86. See, e.g., Kahan, *supra* note 85, at 425.

ment.⁸⁷ Certainly, Kant seems committed to limiting punishment to cases of the actual commission of a crime, and thus, to oppose preventive detention.⁸⁸ But Kant repeats, here and elsewhere, that his objection is not to treating convicted defendants as a means; it is to treating such persons *merely* as a means, or as a means and not at the same time as ends in themselves.⁸⁹

Thus, the Kantian formula of ends by itself does not rule out a criminal jurisprudence that is substantially deterrence-oriented. But it is certainly possible to critique largely deterrence-oriented criminal jurisprudence from the standpoint of the Kantian principle. One interesting, if speculative, line to pursue would ask whether an excessive reliance on deterrence theories may actually tend to undermine the effectiveness of deterrence systems over time.

After all, deterrence is a matter of adjusting disincentives to criminal acts.⁹⁰ The disincentives actually needed to limit criminal acts to any given degree vary among cultures and over time. A Kantian might argue that if we all think of criminal punishments not so much as condemnations but as components of a network of incentives, we may begin to think of crime less as a matter of intrinsic wrong and more as an option with a socially imposed "price" or cost in the form of the possible sentence. The criminal code becomes, to a degree, something akin to a restaurant menu with specified prices for each item. We come to consider the personal benefits of committing the offense; the realistic risks of detection, apprehension, and prosecution; the costs of defense and of the likely criminal sentence; and so on. But this sort of cold-eyed calculation may, over time, tend to progressively drive up the required price, if crime rates are to remain stable in the face of this demoralized, calculative approach to law violation.⁹¹ Under this view, deterrence-oriented theories may become self-destructively unstable in a way that a pure Kantian approach

87. *But see Blarek*, 7 F. Supp. 2d at 201 ("[I]t follows from this position that the sole justification for criminal punishment is retribution or 'jus talionis.'").

88. *See* R. A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 9–10 (1996).

89. *See supra* text accompanying note 83.

90. *See supra* notes 85–87 and accompanying text.

91. For general discussion of the possibility that initially effective elements of deterrence may erode over time, see Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 4–5 (1998) (focusing on gradual change in the perceived "stigma" of a criminal conviction).

may not. Kant may appear to put proportional prices on crimes, but he also wishes to condemn, and not just optimally price, criminality.

In this sense it may be possible to show the Kantian formula of ends having an advantage against deterrence theories of criminal punishment. However, we cannot truly assess the merits of the Kantian formula of ends in this context, as in others, until we have further clarified what the formula really does and does not require.

Most importantly, we must develop a better sense for what is actually involved in treating persons, at least partially, or in some respect, as ends in themselves. Consider the supposedly clear⁹² case of preventive detention. This sort of case is thought to involve a clear violation of the Kantian principle. Thus it has been assumed that

if we . . . preemptively detain someone who has not yet broken the law, our treatment of him does not depend on his choices or actions as a responsible agent but solely on our belief that this will secure some social benefit: we thus treat him “merely as a means” to that social benefit.⁹³

It is certainly possible to imagine some systems of preventive detention that bypass a person’s rational capacities—more specifically the ability on rational or moral grounds to reflect upon and reject a possible criminal action. For example, preventive detention based entirely on some specific DNA configuration that is assumed to dictate behavior might well fail to treat the detainee as a person.

Preventive detention, as traditionally understood, need not take that extreme form. Preventive detention might be based on a person’s deliberate decision to engage in particular forms of dangerous, anti-social, aggressive, or socially irresponsible conduct, regardless of whether such conduct is criminal. The precise contours of the preventive detention policy could be announced long in advance of any such choices by eventual detainees. Certainly, it is possible that reasonable persons could consent to the imposi-

92. See *supra* note 88 and accompanying text.

93. See Duff, *supra* note 88, at 10. For a further critique of excessive reliance on preventive detention under the guise of punishment, see generally Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001).

tion of such a preventive detention program, even as it might eventually affect them personally. To fall within the detention program, each person would, in light of their knowledge of the program, have to then undertake whatever actions were the necessary predicate to preventive detention.

All sorts of preventive detention programs can be imagined. But it is far from clear that all standard forms of preventive detention fail to treat detainees as ends in themselves. Preventive detention may be imposed in light of presumably free and voluntary acts knowledgeably undertaken by the detainee. The preventive detention program in such a case acknowledges and assumes the eventual detainee's capacities to rationally and morally deliberate.

It is of course possible to criticize this kind of preventive detention program on moral grounds. But that hardly solves the Kantian problem. If the preventive detention program described immediately above does not respect detainees as ends in themselves, how can Kantians say that traditional criminal jurisprudence, involving trial and sentencing for a particular criminal offense, does? Essentially the same respect or lack of respect for rational humanity seems involved in both cases.

But the problem for some Kantians is broader than just the context of preventive detention. Consider the deterrence approach more generally. Kantians might say that a pure deterrence approach treats defendants as means to some social goal, such as security of property, personal liberty, or the general well-being.⁹⁴

A deterrence jurisprudence, however, need not treat persons merely as means to any end. One should first note that Kant can hardly consider social goals such as security, well-being, or liberty to be arbitrary or mere subjective fancy.⁹⁵ We can certainly imagine rational persons consenting in advance to the pursuit of these particular social goals, even at their own possible future expense.⁹⁶ More basically, it is simply unclear that a deterrence ju-

94. See *supra* note 86 and accompanying text.

95. Kant regards, for example, one's own happiness as something one inevitably seeks, and he regards seeking the happiness of others as a duty of virtue. See KANT, *METAPHYSICS*, *supra* note 5, at 150. The crucial, non-arbitrary status of these conditions is a major theme of GUYER, *supra* note 43.

96. See, e.g., KANT, *METAPHYSICS*, *supra* note 5, at 108 (discussing the role of advance legislative consent to possible later punishment). More broadly, see, e.g., IMMANUEL KANT,

risprudence must fail, at any point, in all respects to treat persons as ends in themselves.

Deterrence, after all, may take more than one form. We might, admittedly, deter undesirable behavior by some advanced technical means that completely bypasses any deliberation and choice. But deterrence regimes need not work that way. Deterrence regimes, given the analogy to menus with items and associated prices,⁹⁷ may treat persons as much as ends in themselves as a non-profit restaurant.

A restaurant may simply offer a variety of items at associated prices, to be freely selected or not, in accordance with the diner's own deliberations and decisions. A deterrence regime may consciously rely on persons to exercise their powers of deliberation and choice with respect to possible criminal conduct. Whatever social goals deterrence may promote, it need not ignore, bypass, or subvert, and may consciously depend upon, the rational humanity of its subjects.⁹⁸

All told, one could object to a deterrence theory of criminal punishment on any number of grounds. This article has recognized the possibility of some preventive detention and deterrence systems that fail to treat persons as ends in themselves. A deterrence system that relied, for example, on making some persons utterly incapable of choice would presumably fail to treat such persons as ends. There is no reason to suppose, however, that either preventive detention or a deterrence theory of punishment must at some point violate the Kantian formula of ends.

CRITIQUE OF PRACTICAL REASON 74 (Mary Gregor trans., Cambridge Univ. Press ed. 1997) (1788) [hereinafter KANT, CRITIQUE], where Kant links one's possible consent to the status of being an end in oneself. According to Kant, "such a being is not to be subjected to any purpose that is not possible in accordance with a law that could arise from the will of the affected subject himself; hence this subject is to be used never merely as a means but as at the same time an end." *Id.* Of course, we can consent to many things we would not consistently will to be universal laws.

97. See *supra* text at notes 85–86.

98. See *United States v. Bergman*, 416 F. Supp. 496, 499 (S.D.N.Y. 1976) ("[W]e take the widely accepted stance that a criminal punished in the interest of general deterrence is not being employed 'merely as a means . . .'").

B. *Commercial Appropriation of Image or Likeness*

Often, a commercial enterprise hopes to profit by seizing upon some aspect of an attractive or popular person's appearance or persona. Without the person's consent, the commercial enterprise seeks to exploit an element of his or her appearance for commercial gain. The unconsented appropriation of image need not be embarrassing or disruptive of the exploited subject's life. In such cases, however, there is often an unconscious reduction of a person to one or more of her component parts. The person herself is treated as a mere locus of such component parts, and the marketable parts are involuntarily appropriated, at least in the sense of being commercially reproduced, for the financial gain of the commercial enterprise.

Such activities are often recognized as tortious,⁹⁹ despite the law's slow and insensitive start in this matter.¹⁰⁰ The law addressing such nonconsensual image appropriation seems, at first, to give legal effect to the Kantian formula of ends. One author has argued that "[t]he commodification and nonconsensual commercial exploitation of another's name or photograph appears to violate this basic Kantian prescription, and thus the subject's personal dignity."¹⁰¹

Does the tort of nonconsensual appropriation of image for profit exhaust the relevant concerns underlying the Kantian formula of ends? Does, for example, any Kantian indignity in the reduction

99. See, e.g., *Martin Luther King, Jr. Ctr. for Soc. Change v. Am. Heritage Prods. Inc.*, 296 S.E.2d 697 (Ga. 1982); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); *Lake v. Wal-Mart Stores*, 582 N.W.2d 231, 234 (Minn. 1998) (recognizing that "the vast majority of jurisdictions now recognize some form of the right to privacy"); *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004 (N.Y. 1981) (recognizing a statutory privacy right in New York).

100. Consider the well-known "Flour of the Family" case of *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902). In *Roberson*, the unauthorized publication of photographs of a young woman for commercial gain could not be enjoined, even if the woman in question suffered ridicule and great mental and physical distress, where the image utilized was not libelous although readily recognizable. See *id.* at 442-43.

101. Scott Shorr, Note, *Personal Information Contracts: How to Protect Privacy Without Violating the First Amendment*, 80 CORNELL L. REV. 1756, 1771 n.59 (1995). See generally Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 467 (1992) (discussing Kant's opposition to the use of persons merely as a means inspires arguments in favor of limiting some commercial speech); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1280 (1983) (discussing Kant on persons as objects of commercial manipulation).

of a person to his or her most sexually appealing features disappear if the model gives his or her consent and is paid? Obtaining the model's consent may bring the transaction squarely into the realm of market exchange. And there are, undoubtedly, some elements, or proto-elements, of Kantian dignity in a free and voluntary market exchange. For example, free and voluntary market exchange typically involves "treating all buyers and sellers on the market impersonally and honestly."¹⁰²

This article will later address the question of whether properly functioning markets can be taken as an institutional embodiment of Kantian respect for persons as ends.¹⁰³ In the meantime, hanging the moral quality of commercial appropriation of personal appearance on whether consent has been given seems more Lockean than Kantian. It is, after all, John Locke who more strongly emphasizes that "every Man has a Property in his own Person."¹⁰⁴

Kant, in contrast, emphasizes the dignitary character not only of what people do to us without our consent, but what we do to or choose for ourselves as well. Consider, for example, this variation of Kant's formula:

Now I say that the human being, and in general every rational being, *exists as an end in itself, not merely as a means* to be used by this or that will at its discretion; instead, he must in all his actions, *whether directed to himself or also to other rational beings*, always be regarded *at the same time as an end*.¹⁰⁵

For Kant, the formula of ends may be violated by particular actions directed toward oneself, or the acts of others bearing upon one's dignity to which one may well have consented. Therefore, one cannot, given one's status as an end, consent to one's own

102. BERNARD BARBER, ABSOLUTIZATION OF THE MARKET: SOME NOTES ON HOW WE GOT THERE FROM HERE, IN *MARKETS AND MORALS* 15, 26 (Gerald Dworkin et al. eds., 1977).

103. See *infra* Parts IV.C, F.

104. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* § 27, at 328 (Peter Laslett ed., Cambridge Univ. Press 1970) (1690); cf. Stephen M. Lobbin, *The Rights of Publicity in California: Is Three Really Greater than One?*, 2 *UCLA ENT. L. REV.* 157, 159 (1995) (discussing the right of publicity as requiring compensation for the appropriation of one's persona); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 *CALIF. L. REV.* 127, 130 (1993) (discussing the commercial value of a celebrity's identifying characteristics as his or her property).

105. KANT, *GROUNDWORK*, *supra* note 1, at 95 (emphasis added).

murder for the sake of pain relief, as an act of retaliation, or merely for a favorable insurance settlement.¹⁰⁶

Thus, if there is something inconsistent with one's status as an end in being reduced to merely one's most popular or most marketable anatomical features, or to one's mere appearance, even voluntary, compensated consent to this appropriation may not save the buyer or seller from a violation of the formula of ends.

One may well argue that not all such commercial reductions, compensated or not, really amount to grievous moral or legal offenses. This is a fair and important point. Perhaps one way to draw a distinction would be to say that commercial advertising of some constituent part of a person may tend to reduce the person to that constituent part. This process of reduction, however, does seem to come in degrees.

When a woman is reduced to her mere personal appearance, the consequences may be harmful for her, cumulatively for other women, and ultimately for all persons.¹⁰⁷ Not all cases of commercial appropriation seem to involve significant reductionism. If they do, then not all reductionism really amounts to what we might call dehumanization. If one calls all commercial exploitation dehumanizing, then dehumanization itself seems to come in degrees. In today's commercial market, some cases of reductionism are not to be taken entirely straight, but as ironic, distanced, or unserious.

In any event, it seems clear that both reductionism and dehumanization in themselves, as well as any resulting harms, can vary significantly in degree. Consider first a basketball shoe advertising campaign that attempts to reduce a reasonably interesting, rational decision-making basketball star to merely a person with extraordinary leaping ability. Suppose even that such commercial campaigns actually have some tendency to discourage, or to undermine the credibility of, the athlete who later meaningfully addresses any social issue.

106. See *id.* at 96–97 (giving examples of particular reasons to commit suicide). This is not to suggest that Locke would put no restraints on what we may do with our own bodies if those actions do not directly affect others. See LOCKE, *supra* note 104, § 6, at 288–89.

107. For example, one might think of a receptionist who is hired and retained not so much on a range of office skills, but largely on the basis of mere appearance.

Still, this plainly cannot be as intrinsically bad, or as bad in its further consequences, as some other forms of failure to treat persons as ends in themselves. Consider, as a clear example, a military commander who orders the deliberate bombing of purely civilian non-combatant areas in the hopes that such slaughter of innocent persons will tend to demoralize his military opponents.¹⁰⁸ Here, the bombing victims need not be treated at all as ends in themselves. Their exclusive use value lies in the anticipated ability of their deaths, which required no expression of their rational humanity on their part, to affect others. The bombing victims are treated simply as means.

The contrasting examples, along with the range of their inherent and consequential seriousness, tell us that the Kantian formula of ends does not mark off only serious moral error, let alone the most serious error.¹⁰⁹ A clear violation of the Kantian formula of ends need not be a serious moral, let alone legal, violation. After all, it is probably a violation of the formula of ends if we intentionally walk directly behind someone whose sheer physical size has the effect of sheltering us from an unpleasantly cold wind. Doubtless, one recognizes in such a case that our human wind-screen is choosing where to walk through his own exercise of rational capacities, but this seems irrelevant. One could just as easily instead be following some sort of large machine or vehicle down the sidewalk.

Yet this clear violation of the Kantian formula of ends could hardly be classed as morally or legally serious. Ultimately, we will need to develop, generally or in a specific context, something that is unfortunately left underdeveloped in Kant: a satisfactory theory of which violations of the Kantian formula are morally and legally worse than others, and why this is so. The discussion of the legal status of welfare and education below will briefly touch again upon these matters.¹¹⁰

108. For discussion of some relevant international law principles in a moral context, see generally R. George Wright, *Noncombatant Immunity: A Case Study in the Relationship Between International Law and Morality*, 67 NOTRE DAME L. REV. 335 (1992).

109. In this, the formula of ends turns out to be like the Golden Rule, or an injunction to maximize utility. See *supra* Part III.

110. See *infra* Part IV.F.

C. *Workplace Sexual Harassment and the Kantian Formula:
Respect, Opportunity, and Equality*

Workplace sexual harassment, in its many and varied forms, is a particularly useful context to test the best understanding of the formula of ends. Again, our focus will not be on determining how Kant himself, more than two hundred years ago, would have subjectively reacted to women in various sorts of workplaces traditionally reserved for men.¹¹¹ Instead, our focus is on the best possible interpretation of, and the most useful understanding of, the formula of ends in this context.

This is not to say that Kant's work is devoid of material that might bear specifically on some cases of workplace harassment. Consider, for example, that Kant essentially repeats the formula of ends toward the close of *The Metaphysics of Morals*:

Every human being has a legitimate claim to respect from his fellow human beings and is in turn bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists . . . Hence there rests on him a duty regarding the respect that must be shown to every other human being.¹¹²

Kant, of course, does not mean to suggest that the idea of respect bears only one sense, and that this is the sense.¹¹³ But consider the applicability of Kant's remarks, closely following the above restatement of his formula, in which Kant concludes that

holding up to ridicule a person's . . . supposed faults as if they were real, in order to deprive him of the respect he deserves, and the propensity to do this, a mania for caustic mockery . . . has something of fiendish joy in it; and this makes it an even more serious violation of one's duty of respect for other human beings.¹¹⁴

111. We need not endorse any particular attitudes that Kant, a son of the Enlightenment, may have held toward women.

112. KANT, *METAPHYSICS*, *supra* note 5, at 209 (emphasis omitted).

113. See *id.* at 213. See generally Stephen L. Darwall, *Two Kinds of Respect*, 88 *ETHICS* 36 (1977) (distinguishing "recognition respect," the kind most relevant in our context, from the more variable "appraisal respect"). For example, this distinction is roughly akin to the varying degrees of respect earned by tennis players through their prowess or longevity. *Id.* at 41-42.

114. KANT, *METAPHYSICS*, *supra* note 5, at 213 (emphasis omitted). For reference to the phenomenon of "fiendish" joy in some instances of sexual harassment, see e. christi cun-

There are of course many sorts of sexual harassment, motivated and subjectively experienced by their targets in varied ways. Kant's denunciation of caustic ridicule as a violation of the duty of respect certainly cannot cover the range of different sorts of sexual harassment. On the other hand, this denunciation of caustic ridicule reveals that specific Kantian language can be brought to bear on some important dimensions of workplace harassment.¹¹⁵

Some forms of workplace sexual harassment can easily be seen as violative of Kant's formula. Other forms of harassment seem, literally, to comply with at least a minimalist understanding of what the Kantian formula requires. Only when the Kantian formula is taken with proper seriousness can all common forms of sexual harassment be clearly seen as violating that formula. Only then can the full and appropriate structural remedy for workplace harassment come into view.

It is easy to see the relevance of the Kantian formula when the harassment is described in terms of the objectification of the target,¹¹⁶ of degradation,¹¹⁷ or of the relationship between predator and prey.¹¹⁸ This sort of terminology obviously lends itself to analysis in Kantian terms.

ningham, *Preserving Normal Heterosexual Male Fantasy: The "Severe or Pervasive" Missed-Interpretation of Sexual Harassment in the Absence of Tangible Job Consequence*, 1999 U. CHI. LEGAL F. 199, 199.

115. For example, some actionable cases refer to "ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Shira A. Scheindlin & John Eloffson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL'Y REV. 813, 813 (1999) (emphasis added) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

116. See, e.g., *Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir. 1995) (identifying sexual harassment of others as relevant and probative of the defendant's general disrespect for and sexual objectification of his female employees); Kerri Lynn Bauchner, *From Pig in a Parlor to Boar in a Boardroom: Why Ellerth Isn't Working and How Other Ideological Models Can Help Reconceptualize the Law of Sexual Harassment*, 8 COLUM. J. GENDER & L. 303, 303 (1999) (making reference to a victim's actual subjective feelings of objectification and degradation); see also Bauchner, *supra*, at 307-08 (analyzing encroachment upon a victim's "sense of sanctity" and describing sexual harassment as "demeaning" and "incompatible with dignity and well-being of all the women in that workplace") (quoting *Leibovitz v. New York City Transit Authority*, 4 F. Supp. 2d 144, 152 (E.D.N.Y. 1998)).

117. See, e.g., Bauchner, *supra* note 116, at 303.

118. See Janet Sigal & Heidi Jacobsen, *A Cross-Cultural Exploration of Factors Affecting Reactions to Sexual Harassment Attitudes and Policies*, 5 PSYCHOL. PUB. POL'Y & L. 760, 770 (1999).

It is less obvious that all standard forms of workplace sexual harassment violate the Kantian formula. This is true of at least some instances of both quid pro quo and hostile environment sexual harassment.¹¹⁹ We can, for example, imagine a case of quid pro quo sexual harassment in which the harasser fully credits the target's ability to perform all sorts of subtle rational calculations regarding the harasser's true intent, the harasser's true organizational status and power, the likelihood of a bluff, the victim's actual degree of vulnerability, the chances of institutional or legal redress, and the effects of compliance or resistance on the likelihood of future threats.¹²⁰ In a sense, granting, and even relying on, the target's ability, even under emotional circumstances,¹²¹ recognizes the target as a rationally deliberative end in herself.

A harasser might implicitly envision his victim as capable of rationality and moral law making, and thus not a mere thing.¹²² For some harassers, there may be no real motive for the harassment, and less reason¹²³ either for overt anger or for humiliating fun, if the target were indeed merely an object or thing.¹²⁴

In the end, the Kantian formula, when suitably interpreted, can handle not only both the most overtly degrading, rationality-bypassing sorts of sexual harassment¹²⁵ and pervasive ridicule,¹²⁶

119. See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

120. See, e.g., Steven H. Aden, "Harm in Asking: A Reply to Eugene Scalia and an Analysis of the Paradigm Shift in the Supreme Court's Title VII Sexual Harassment Jurisprudence," 8 TEMP. POL. & CIV. RTS. L. REV. 477, 498-99 (1999); Barbara A. Gutek, et al., *The Utility of the Reasonable Woman Legal Standard in Hostile Environment Sexual Harassment Cases: A Multimethod, Multistudy Examination*, 5 PSYCHOL. PUB. POL'Y & L. 596, 602 (1999) ("[W]omen who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault.").

121. See, e.g., Anita Bernstein, *An Old Jurisprudence: Respect in Retrospect*, 83 CORNELL L. REV. 1231, 1236 (1998) [hereinafter Bernstein, *An Old Jurisprudence*]; Anita Bernstein, *Treating Sexual Harassment With Respect*, 111 HARV. L. REV. 445, 461 (1997) [hereinafter Bernstein, *Treating Sexual Harassment*].

122. See, e.g., KANT, *GROUNDWORK*, *supra* note 1, at 102 (discussing the importance of moral thinking for the status of being an end in oneself).

123. See *id.* at 95 (referring to "arbitrary use" of another).

124. This seems potentially true even with some cases of hostile environment sexual harassment, the more difficult kind of case in this respect. Something might be added to a hostile work environment in part for the fiendish entertainment of provoking the target to reflect on the situation and her options, and to then make some sort of rational response.

125. Some forms of workplace harassment, for example, may take the form of a sexual battery in which the perpetrator is indifferent to the state of mind of the victim, and where the sexual battery might occur even if the victim were, for some reason, temporarily

but also all sorts of sexual harassment. It can do so in a way that recognizes the social systemic dimension and structural elements of workplace harassment and discrimination.¹²⁷

Some forms of sexual harassment doubtless reflect unarticulated fears, whether of competition or of the upset of one's world view. Kant insightfully observes that someone can be the object of fear, yet not the object of respect.¹²⁸ In fact, a leading scholar in the field of sexual harassment law, Professor Anita Bernstein, proposes to change the legal standard in sexual harassment cases from that of a reasonable person, a reasonable woman, or a reasonable victim, to what should be required of a "respectful person."¹²⁹

Professor Bernstein relies explicitly on basic Kantian concepts, including the linkages among the capacity for reason and intrinsic value and the respect-worthiness of all persons.¹³⁰ Professor Bernstein then argues that

a fundamental meaning of respect, apart from a separate meaning of esteem, is recognition of a person's inherent worth. Respect in the sense of recognition is owed to all persons, and thus workplace sexual harassment betrays the ideal of recognition respect, regardless of whether the harassed worker deserves high esteem.¹³¹

It is certainly fair to think of Kantian, or recognition, respect as an ideal, even though the crucial aim of sexual harassment law is to arrive at legally enforceable standards. Straightforwardly, "recognition" or Kantian formula of ends respect must, in a sense, remain an ideal until it is universally accorded. A society without

incapable of recognizing or reacting to the battery in question.

126. See *supra* note 114 and accompanying text.

127. See, e.g., Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 39-41 (1990) (describing sexual harassment as a systemic problem rather than "the isolated problem of a lone victim" and rejecting the liberal legal value of autonomy, but only on the assumption that analysis in terms of autonomy must be individualizing, and thus blind to the systematic or social nature of subordination).

128. See KANT, CRITIQUE, *supra* note 96, at 66.

129. See *supra* note 121.

130. See Anita Bernstein, *Treating Sexual Harassment*, *supra* note 121, at 484. Professor Bernstein also notes that "human beings, according to Kant, possess intrinsic value and are entitled to respect." *Id.* at 483.

131. *Id.* at 452 (emphasis omitted). For a distinction between "recognition respect" and "appraisal respect," see Darwall, *supra* note 113.

murder is in this sense also an ideal, but that does not prevent us from making murder a legal, and not just a moral, wrong.

Less straightforward, the moral imperative of Kantian respect for persons is violated even in a case in which the target does not object to the harassment, perhaps because she has been persuaded that it is normal, or "nothing personal." In such a case, a complaint may never be filed, and thus no legal case arises. Under current hostile environment harassment law, the target in such a case would, rightly or wrongly, have to show that she perceived the environment as hostile or abusive at the time.¹³²

The basic Kantian approach can accommodate this failure of the law to provide a remedy in such cases, given the clear violation of a universal moral duty. Kant broadly distinguishes between ethical duties or duties of virtue on the one hand, and duties of right on the other; the former are not always legally enforceable.¹³³ However, there is no deep Kantian reason why the Kantian duty of respect should not be legally enforced even in cases in which the target did not, for some reason, perceive her situation to be one of harassment.

More disturbing is the possibility that Kant's formula of ends so thoroughly reflects Enlightenment individualism that an approach to sexual harassment based on the dignity of the person must misunderstand the social systemic¹³⁴ dimensions of sexual harassment—dimensions of structural subordination,¹³⁵ group inequalities,¹³⁶ broad denial of a range of opportunities,¹³⁷ and so on.

132. See Bernstein, *Treating Sexual Harassment*, *supra* note 121, at 452.

133. See, e.g., KANT, *METAPHYSICS*, *supra* note 5, at 156–57.

134. See Bernstein, *An Old Jurisprudence*, *supra* note 121, at 1233 (discussing Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1187 (1998)).

135. See *id.*

136. Abrams, *supra* note 134, at 1187; Bernstein, *Treating Sexual Harassment*, *supra* note 121, at 485; Scheindlin & Eloffson, *supra* note 115, at 813.

137. See Bernstein, *Treating Sexual Harassment*, *supra* note 121, at 495; Julianne Scott, *Pragmatism, Feminist Theory, and the Reconceptualization of Sexual Harassment*, 10 UCLA WOMEN'S L.J. 203, 213 (1999). Probably the most thorough treatment of the range of such lost opportunities, and their potentially prejudicial effects on the target's workplace competence, is an article by Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998). See also *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 631 (1991) (requiring a showing that the harassment effectively "denied equal access to an institution's opportunities and resources" in a Title IX sexual harassment case).

For all of Kant's individualism, however, he can also be well-attuned to the social and systemic dimensions of morally important issues. For example, consider the key issue of wealth and poverty itself. Kant does not focus on differential individual exertion, or even on individual differences in luck or talent. Instead, he interestingly writes that

[h]aving the resources to practice such beneficence as depends on the goods of fortune is, for the most part, a result of certain human beings being favored through the injustice of the government, which introduces an inequality of wealth that makes others need their beneficence.¹³⁸

Thus, Kant is well aware of the possibility of systematic economic inequalities of opportunity in general.¹³⁹

A Kantian faithful to the respect owed to all persons as ends in themselves can offer an explanation of, and a moral and legal response to, the problem of sexual harassment that goes far beyond seeing individual victims and individual perpetrators in isolation.¹⁴⁰ A faithful Kantian will instead see sexual harassment as, among other things, tending to inhibit the otherwise possible development of the target's capacities for rational deliberation¹⁴¹ and choice on the job. Sexual harassment also fails to minimally cooperate with the victim's morally permissible projects,¹⁴² chosen

138. KANT, *METAPHYSICS*, *supra* note 5, at 203. By way of contrast, consider John Locke's belief that "as different degrees of Industry were apt to give Men Possessions in different Proportions, so this Invention of Money gave them the opportunity to continue to enlarge them." LOCKE, *supra* note 104, § 48, at 343.

139. It is unnecessary to assume that Kant's concern for human dignity must be unrelated to any concern for the effects of inequalities in status. A recent article, for example, assumes that "Kantians might want to argue that the obvious source of the injury from sexual harassment is the affront to the dignity of women that such harassment implies, and this is unrelated to their rank in any status hierarchy." Gertrud M. Fremling & Richard A. Posner, *Status Signaling and the Law, with Particular Application to Sexual Harassment*, 147 U. PA. L. REV. 1069, 1084 (1999).

Presumably, one's subordinate status in some hierarchy facilitates just the sort of insult and ridicule Kant condemns as contrary to the worth of persons. *See supra* note 114. The status difference adds depth, seriousness, credibility, and further complexity to the narrower indignity itself.

140. *See supra* notes 134–39 and accompanying text.

141. Kant sees everyone as having a moral duty to cultivate and develop their own rational capacities, but not generally to direct that cultivation in others. This would be self-defeating paternalism. *See* KANT, *METAPHYSICS*, *supra* note 5, at 150–51. However, we certainly have an affirmative duty to provide the basic material prerequisites of rational development in others, and to promote the happiness of others while not impairing their opportunities for rational development. *See id.* at 101, 150–51.

142. *See id.* at 151.

by her¹⁴³ in her own way.¹⁴⁴ For this analysis, we have quite reasonably assumed that despite the resentment and hostility sometimes addressed to women occupying traditionally male job positions, the women incumbents of such non-traditional jobs are not in fact violating any genuine, objective moral rule.¹⁴⁵ If addressing these wrongs requires legal reform of a systemic sort, then that is what is called for. This article will further pursue the idea of systemic law reform in Kant below.¹⁴⁶

D. *Human Cloning and the Surprising Reinforcement of Human Dignity*

Human cloning may or may not eventually become routine. Whether it does is actually irrelevant to the forthcoming argument. For now, the serious moral issues raised by human cloning remain largely hypothetical. However, there is some possibility that those moral issues related to cloning will eventually become real, and if so, corresponding issues of legal regulation will arise.

Kant's formula of ends cannot by itself satisfactorily address all of the possible variations among cloning scenarios. Some imaginable forms of abusive cloning can indeed be convincingly critiqued from the standpoint of the formula of ends, but others less directly so. As this article will discuss, some forms of human cloning exemplify and reinforce several basic Kantian presuppositions underlying the formula of ends.

143. See *id.*

144. In the *Critique of Practical Reason*, Kant essentially repeats the formula of ends in arguing that a rational, autonomous person "is not to be subjected to any purpose that is not possible in accordance with a law that could arise from the will of the affected subject himself . . ." KANT, *CRITIQUE*, *supra* note 96, at 74. Consider how this fundamental Kantian requirement would play out in typical cases of sexual harassment. Should we suppose that even in the least threatening cases of quid pro quo sexual harassment, the victim could reasonably and consistently want to be subjected to non-consensual sexual harassment as part of a relevant universalization of such practices of sexual harassment for all times and places? Could any victim of sexual harassment rationally and consistently will that fate not only for herself, but for every other relevantly situated person? At the very least, quid pro quo sexual harassment, if universalized, founders on the scarcity of possible job promotions. Universal sexual harassment, if that is itself even possible, could not be compensated for by universal job promotion. The logic of any victim's willing hostile environment sexual harassment for herself and for every other similarly situated person at all times and places is even more obscure.

145. See KANT, *METAPHYSICS*, *supra* note 5, at 151.

146. See *infra* Part IV.F.

There are some cloning scenarios that the Kantian formula can obviously handle well. These cases include, for example, those in which a clone with all of the rational and other capacities necessary for free, deliberate, responsible, autonomous moral and other choice is nonetheless treated merely as a means to some arbitrary, subjective end. In other words, a clone who is capable of free and rational choice must be allowed to exercise such choice on appropriate occasions. The philosopher of science Philip Kitcher argues that

if cloning a human being is undertaken in the hope of generating a . . . person whose standards of what matters in life are imposed from without, then it is morally repugnant, not because it involves biological tinkering, but because it is continuous with other ways of interfering with human autonomy that we ought to resist.¹⁴⁷

This sort of dramatic interference with the goal-setting and other reasoning processes of the clone plainly violates the Kantian requirement that persons be treated as ends in themselves.¹⁴⁸

As for some other human clones, including some “hybridized” and genetically enhanced or “designer” human clones, there is no reason to believe that they will lack the capacities for rational moral and other choice that is fundamental to Kantian status as an end in oneself—assuming there are no disastrous mishaps in the cloning process itself.

Early on in the collective experience with human cloning, some custodial parents of physiologically normal clones may attempt, in various ways, to deny the autonomy and Kantian dignity of the clone offspring. Some may expect the clone of a great athlete to be similarly accomplished, the clone of a fashion model to be beautiful, and the clone of a distinguished scientist to reach similar heights of achievement. Inevitably it will be proven, however, that neither environment nor genetics is solely responsible for one’s acquired traits.¹⁴⁹ Eventually, custodial parents will learn

147. PHILIP KITCHER, *THE LIVES TO COME: THE GENETIC REVOLUTION AND HUMAN POSSIBILITIES* 335 (1996).

148. See KANT, *METAPHYSICS*, *supra* note 1, at 96; see also Michael H. Shapiro, *I Want a Girl (Boy) Just Like the Girl (Boy) that Married Dear Old Dad (Mom): Cloning Lives*, 9 S. CAL. INTERDISC. L.J. 1, 139 (1999) (discussing how someone seen as merely a collection of traits, and in this way objectified, may be being treated as a mere means, rather than as an end).

149. It is apparently possible, for example, that a clone resulting from a father’s nuclear cell material and a mother’s mitochondrial genetic material outside the donor nu-

that a clone is not a perfect genetic duplicate of the donor nucleus, that the clone had a distinctive in utero and post-natal environment,¹⁵⁰ and that the flourishing and appreciation of talent is largely a matter of historical and cultural context,¹⁵¹ modified by sheer luck.¹⁵²

Thus, cloning one's self, a relative, a genetically healthier or relatively more attractive person is unlikely, over the long term, to seriously jeopardize the autonomy of the resulting clones.¹⁵³ One could argue that the mere existence of the clone is an affront to human dignity; however, this is hardly self-evident. Are identical twins somehow an affront to human dignity? Quadruplets? Two clones?

Identical twins are, of course, generally not intended or artificially produced. One might object to the cloning process itself; this is different from showing that the genetically human result of the cloning process is not an end in his or her self, or lacks Kantian dignity. Consider a thought experiment in which one grows up with a girl who seems in every respect to be entirely normal, but after, say, forty years of experience, it is discovered that the girl is actually the clone of someone across the globe. Is there grounds to say that she only appeared to be an autonomous end in herself, but that it is now apparent that she is not and never actually was? Does it matter whether the clones know of each other?

cleus may to some extent be affected by the mitochondrial genetic material. See David Orentlicher, *Cloning and the Preservation of Family Integrity*, 59 LA. L. REV. 1019, 1019 n.1 (1999); Michael H. Shapiro, *The Impact of Genetic Enhancement on Equality*, 34 WAKE FOREST L. REV. 561, 567 n.19 (1999) ("The genome only provides the blueprint for formation of the brain; the finer details of assembly and intellectual development are beyond direct genetic control and must perforce be subject to innumerable stochastic and environmental influences.") (quoting Jon W. Gordon, *Genetic Enhancement in Humans*, 283 SCI. 2023-24 (1999)).

150. See Shapiro, *supra* note 149, at 567 n.19.

151. Having the genetic foundation of a singing voice like that of Rudy Vallee, Bing Crosby, or David Lee Roth is of little economic value if the clone's surrounding popular culture is unresponsive to those vocal qualities, even merely as a matter of fashion.

152. Being a clone of Michael Jordan can hardly guarantee against an early, career-ending injury to, say, one's Achilles' heel.

153. Of course, if the practice of cloning athletic or attractive persons becomes widespread, one would expect the laws of supply and demand to assert themselves, resulting in a diminished payoff for the now more abundant traits in question.

Of course, cloning scenarios that range from the irresponsible to the freakish or even horrifying can be envisioned.¹⁵⁴ One can imagine clones, whether deliberately mentally stunted or not, intended merely to serve as predesignated spare bodily organ bags for transplantation piecemeal into ill, but more desired, siblings.¹⁵⁵ Such a practice reduces the produced clone to merely an organ bank—a means to enhance the health or longevity of another person, with or without the clone's consent. This treatment generally violates the Kantian formula of ends.

One can conceive of large numbers¹⁵⁶ of clones, whether similar in appearance or not, deliberately bred as a stunted, perpetually docile, but somehow a useful, laboring,¹⁵⁷ or slave laboring, class.¹⁵⁸ Perhaps to add to the limited market demand for such afamilial creatures, their genes could be altered not only for docility, but for marketable qualities such as increased tolerance of pain, radiation, or some forms of pollution.¹⁵⁹

At this point, one must be careful in providing a Kantian account. It has been assumed that the clones referred to immediately above were, to some unspecified degree, designed to be mentally stunted, perhaps from a stage very near the beginning of their existence. If such clones genuinely never had the potential to become persons, in the sense of being capable of rational autonomy, of free and deliberate reasoning, of recognizing the moral law, and of choosing in accordance with reason and moral-

154. The popular imagination is touched by the fictional neo-Nazi plot developed in IRA LEVIN, *THE BOYS FROM BRAZIL* (reprint ed., 1995). Less dramatically, we can at least imagine a clone designed to bear a corporate logo as a prominent birthmark, or a clone designed to be unsteady on her feet, and thus subject to frequent falls for the sake of entertainment or wagering.

155. For a range of responses, see, e.g., Michael Tooley, *The Moral Status of the Cloning of Humans*, in HUMAN CLONING 65, 65–77 (James M. Humber & Robert F. Almeder eds., 1998); Lori B. Andrews, *Is There a Right to Clone?: Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J.L. & TECH. 643, 657 (1998); Michael A. Goldman, *Human Cloning: Science Fact and Fiction*, 8 S. CAL. INTERDISC. L.J. 103, 115 (1998).

156. See David M. Buyers, *An Absence of Love*, in HUMAN CLONING: RELIGIOUS RESPONSES 66, 75 (Ronald Cole-Turner ed., 1997).

157. See John A. Robertson, *Liberty, Identity, and Human Cloning*, 76 TEX. L. REV. 1371, 1418 (1998). See generally ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932).

158. See JONATHAN GLOVER, *WHAT SORT OF PEOPLE SHOULD THERE BE?* 38 (1984); *Cloning Position Paper of the IIT Institute For Science, Law and Technology Working Group On Reproductive Technologies*, 8 S. CAL. INTERDISC. L. J. 87, 98 (1998); Robertson, *supra* note 157, at 1415.

159. See, e.g., George J. Annas, *Human Cloning: A Choice Or An Echo*, 23 U. DAYTON L. REV. 247, 251 (referring to the design of such "parahumans").

ity, then whatever their creators do, however horrifying, cannot directly violate the Kantian dignitary formula of ends.

In short, it might not be wrong to fail to treat such stunted clones as persons, precisely because they are not persons, and in a sense never were potential persons. However, this possibility does not leave the orthodox Kantian with nothing to say regarding moral criticism of such a practice. Kant says, for example, that we have no genuine and direct moral duty toward non-human animals incapable of moral reasoning.¹⁶⁰ But Kant explicitly recognizes that how we treat animals may come to affect, for good or ill, how we treat persons to whom we obviously do owe direct moral duties.¹⁶¹

Just as we might come to owe an indirect moral duty not to mistreat non-human animals, we might have indirect moral duties toward clones incapable of personhood, and more broadly with respect to the institutional practice of generating clones. If it turns out to be possible to initiate, let alone restore, rational capacities in the stunted clones, we may have a moral duty in that respect as well.¹⁶²

In any event, one should consider how human cloning, the above abuses aside, might well highlight, rather than undermine, Kant's conception of human dignity. Human cloning seems to threaten the values of distinctiveness, individuality, and uniqueness. Such threats may or may not prove genuine. However, focusing on such threats may cause us to overlook the fact that dignity in the Kantian sense is not a matter of individual distinctiveness. Dignity in the Kantian sense is not something we have because we are each special and unique,¹⁶³ rather, it is something we have that is widely shared.¹⁶⁴

Quite apart from, and perhaps contrary to, popular expectations,¹⁶⁵ human cloning may, in the long run, set off and highlight

160. See IMMANUEL KANT, LECTURES ON ETHICS 239–41 (Louis Infield trans., 1963) (1775–1780) [hereinafter KANT, LECTURES].

161. See *id.*

162. See *supra* note 55 and accompanying text.

163. See Ted Peters, *Cloning Shock: A Theological Reaction*, in HUMAN CLONING: RELIGIOUS RESPONSES, *supra* note 156, at 12, 22 ("It is not individuality or identity per se that constitutes a person's dignity. Uniqueness does not determine dignity.").

164. See *supra* notes 19–28 and accompanying text.

165. See, e.g., G. W. F. HEGEL, REASON IN HISTORY: A GENERAL INTRODUCTION TO THE PHILOSOPHY OF HISTORY 43–44 (Robert S. Hartman trans., 1953) (1837) (discussing "the

the ultimately mysterious¹⁶⁶ Kantian capacities that comprise our being as ends in ourselves.¹⁶⁷ There is dignity in the Kantian sense only if we are not, in all valid senses and from all legitimate perspectives, reducible to our electrochemical, biological, and random outcome-generating parts.¹⁶⁸ Even the most sophisticated organic machine possesses only a price, not a dignity.¹⁶⁹

Human cloning has the potential to help us work through the psychologically difficult task of recognizing that our superficial differences are, in fact, superficial. Human dignity is not a matter of desirable eye color, desirable height, better than average athletic ability, a special facility with foreign languages, a unique facial appearance, or of each person having his own distinctive set of genes. Instead, human dignity lies in the common but utterly mysterious process of genuinely free rational decision-making,¹⁷⁰ a process which a benevolently created and benevolently raised clone would be as capable of as we are. The practice of human cloning, and our contemplation of its practice, might help us fur-

cunning of Reason").

166. Cf. DAVID J. CHALMERS, *THE CONSCIOUS MIND: IN SEARCH OF A FUNDAMENTAL THEORY* 3-5 (1996). Chalmers argues, for example, that

consciousness is *surprising*. If all we knew about were the facts of physics, and even the facts about dynamics and information processing in complex systems, there would be no compelling reason to postulate the existence of conscious experience. If it were not for our direct evidence in the first-person case, the hypothesis would seem unwarranted; almost mystical, perhaps.

Id. at 5.

167. Cf. Elliot N. Dorff, *Human Cloning: A Jewish Perspective*, 8 S. CAL. INTERDISC. L.J. 117, 120 (1998) ("Cloning . . . will, if it is ever effected, produce independent human beings with histories and influences all their own and with their own free will.").

168. The rational, and specifically moral, freedom upon which our dignity is based requires that our moral decisions somehow be based in reason itself and in some sense motivated by respect for universal reason, as distinct from any sort of natural causal impulse or natural causal determination. See KANT, *CRITIQUE*, *supra* note 96, at 76. Kant famously observes that any lesser sort of freedom, of a non-absolute, merely psychological sort "would at bottom be nothing better than the freedom of a turnspit, which, when once it is wound up, also accomplishes its movements of itself." *Id.* at 82; see also GUYER, *supra* note 43, at 152-53; ROGER SCRUTON, *KANT* 64-66 (1982) (explaining Kant's position on the relationship between the individual and morality); RALPH WALKER, *KANT* 55 (1999) (explaining that to be unable to act not merely in accordance with, but out of respect for, the law would be to limit ourselves to automata or mechanical figures).

169. See KANT, *GROUNDWORK*, *supra* note 1, at 42 ("What is related to general human inclinations and needs has a market price; . . . but that which constitutes the condition under which anything can be an end in itself has not merely a relative worth, that is, a price, but has an inner worth, that is, dignity.").

170. Kant recognizes that we shall never be able to comprehend how freedom is possible. *Id.* at 55. For merely one instance of Kant's struggling with the relationship between freedom and natural causal necessity, and between the intelligible and the sensible world, see *id.* at 118-31, and DICKENS, *supra* note 81, at 70.

ther identify what is merely superficial, and what is essential, to human dignity.¹⁷¹

E. *Kantian Ends and a Legal Requirement of the Rescue of Persons*

The Kantian formula of persons as ends in themselves, along with related elements of Kantian moral and legal theory, speak to the uneasiness of the American law on legally mandated rescues. Let us focus first not at the level of abstraction, but with the well-known case of *Yania v. Bigan*.¹⁷²

The underlying events in *Yania* occurred on September 25, 1957, in a strip-mining area of Somerset County, Pennsylvania.¹⁷³ Yania and Bigan were apparently not competitors, but rather friendly fellow strip-mine operators.¹⁷⁴ Yania and Boyd Ross arrived at Bigan's property in order to discuss business.¹⁷⁵ Bigan asked the two men to help him start a water drainage pump.¹⁷⁶ The pump was connected to a large trench which was filled to a depth of eight to ten feet with water, with an embankment or side wall sixteen to eighteen feet in height.¹⁷⁷ Yania jumped from the embankment and drowned in the trench.¹⁷⁸ Yania's survivors, plaintiffs in this action, alleged that Bigan caused Yania, by means of "urging, enticing, taunting, and inveigling,"¹⁷⁹ to jump into the water trench. Yania was thirty-three years old and "in full possession of his mental faculties at the time he jumped."¹⁸⁰

171. There is a rapidly growing literature devoted to the morality and possible legal regulation of human cloning. See, e.g., CLONES AND CLONES: FACTS AND FANTASIES ABOUT HUMAN CLONING (Martha C. Nussbaum & Cass R. Sunstein eds., 1998); ETHICAL ISSUES IN HUMAN CLONING (Michael C. Brannigan ed., 2001); LEON R. KASS & JAMES Q. WILSON, THE ETHICS OF HUMAN CLONING (1998); GREGORY E. PENCE, WHO'S AFRAID OF HUMAN CLONING? (1998); Gilbert Meilaender, *Cloning in Protestant Perspective*, 32 VAL. U. L. REV. 707 (1998); R. George Wright, *Second Thoughts: How Human Cloning Can Promote Human Dignity*, 35 VAL. U. L. REV. 1 (2000).

172. 155 A.2d 343 (Pa. 1959).

173. *Id.* at 344.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 345 n.1.

The court held that mere taunting, cajolery, or verbal enticement of a person, unlike a case involving a young child or mentally disabled person, could not constitute actionable negligence on the part of Bigan¹⁸¹ because any danger posed by the trench was as evident to Yania as to Bigan.¹⁸²

The court then took note of, what for us is the essential matter, the possible existence and scope of any legal duty to rescue another person.¹⁸³ The court concluded:

The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position The complaint does not aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water and, absent such legal responsibility, the law imposes on Bigan no duty of rescue.¹⁸⁴

The rather brief opinion in *Yania* offers no extended defense of the general no-legal-duty-to-rescue rule.

Arguably, the opinion is not as forthcoming about some relevant facts as it might have been. For example, what were the acts or omissions of Mr. Ross, the gentleman who accompanied Yania? Were any of Bigan's employees present or accessible? Was any potential rescue device, such as a rope or wire, reasonably available? Was there any place to attach such a rescue device? Was the water temperature such as to limit the time realistically available for a rescue? Was Yania at all injured by his jump? Was he conscious at all times? Could Yania, Bigan, Ross, or any other relevant person swim? Did the height and steepness of the sidewall of the trench make any jump into the trench equally risky? Would a person attempting a rescue by jumping in be placing himself into a position of peril hardly better off than that of Yania himself?

It is possible to argue that under the circumstances, some special relationship should have been found to exist between Yania and Bigan. For the purpose of this article, however, it is more

181. *Id.* at 345.

182. *Id.* at 344-46.

183. *Id.* at 346.

184. *Id.*

useful to examine the case, and possible variations therein, without assuming any sort of relevant special relationship between Yania and Bigan.¹⁸⁵ Thus, it will be assumed that there are two Kantian ends in themselves, in a natural and social context of some complexity.¹⁸⁶

Kant actually says much that is arguably relevant to a moral or legal duty to rescue, but little that can directly and uncontroversially decide Yania's legal case. An examination of Kant's famous fourth illustration of one of his alternative formulas of the categorical moral imperative is helpful.¹⁸⁷

Kant sets up his fourth illustration by referring to a person who is flourishing, but who sees others who have to struggle with great hardships (and whom he could easily help), and he thinks: What does it matter to me? I won't deprive him of anything . . . only I have no wish to contribute anything to his well-being or to his support in distress.¹⁸⁸ Kant's view is that such a policy could not be consistently willed by a person to hold as a universal practice over all time, regardless of the person's own circumstances.¹⁸⁹ On some occasions, such a rule would, Kant assumes, result in the suffering or death of the person initially willing in this fashion.

A rich and secure person who expects to remain rich and secure may calculate that he or she may be likely to lose more by having to perform nearly risk-free and costless rescues of nearby strangers than he or she realistically stands to gain from others, given the extreme unlikelihood of such a person ever requiring a gratuitous rescue. To avoid such problems, John Rawls originally adopted certain constraints on choosing basic rules of justice, such as the veil of ignorance¹⁹⁰ and a maximin choice strategy.¹⁹¹

185. The courts have often cited WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 56 (4th ed. 1971), for both the general no-legal-duty-to-rescue rule, and for possible sorts of relevant special relationships.

186. Again, because of the legal logic and brevity of the opinion, we are left to speculate about a number of considerations relevant to a moral, and perhaps even to a legal, duty to rescue.

187. See KANT, GROUNDWORK, *supra* note 1, at 33.

188. *Id.*

189. See *id.*; see also ALLEN D. ROSEN, KANT'S THEORY OF JUSTICE 199–201 (1993) (explaining Kant's theory of the rational and self-integrated man).

190. See JOHN RAWLS, A THEORY OF JUSTICE 12 (1971).

191. See *id.* at 75–83; John Rawls, *Some Reasons For the Maximin Criterion*, AM.

One can add to the persuasiveness of Kant's account by assuming that he is asking that the choice be made to cover all times and places, and not merely beginning now, when the chooser may know himself or herself to be permanently secure. A rich and secure person, particularly of advanced age, might well opt for a no-morally-required-riskless, low-cost rescues-of-strangers rule.¹⁹² Such a rule might seem less attractive, however, if it were also to be applied backwards through history—perhaps including the rescue, or non-rescue, of some of the chooser's own non-rich ancestors, or even the chooser as a small child.

As they stand, both the *Yania* case and Kant's fourth illustration are complex and murky enough to prevent simply applying the latter to the former. We are unsure of the power and conviction of the latter, especially in cases where the potential rescuer is unlikely to need similar assistance in the future.

Some progress can be made, however, if we simplify, and indeed materially change, the circumstances in *Yania*. Simply assume that the defendant Bigan was the only possible rescuer of Yania, and that Bigan knew that he could have rescued Yania, perhaps by throwing an attached rope, at little cost or risk to himself. These assumptions make the proper moral outcome clear. The argument is strengthened if one assumes that Yania has not taken Bigan's proximity into account in leaping into the water.

That proper moral outcome in this revised *Yania* case is clear, however, does not mean that Kant's fourth illustration above makes it clear. If it is to be explained why Bigan should rescue Yania, the best bet may not be to emphasize any likelihood that Bigan himself may one day want to be rescued. Any such approach seems unnecessarily indirect and not entirely candid. The real reason Bigan would be morally required to rescue Yania reminds us of the positive Golden Rule, but is ultimately most deeply accounted for by Kant's formula of ends.

ECON. REV., May 1974, at 141. While the veil of ignorance is intended to allow our basic choices of rules of justice to take place untainted by improper considerations, the maximin strategy emphasizes avoiding disastrous possible outcomes, even at some cost in what we might most likely have obtained.

192. The reference to "strangers" is merely awkward shorthand for the various conditions which Kant, other theorists, or the law might build regarding a moral duty to rescue relatives, those whom we have helped place in peril, or on various forms of contractual and other special relationships. See *supra* note 185.

The simplest and best account of why Bigan morally ought to rescue Yania, within the Kantian framework, is that Yania is an end in himself, a person, a locus of incomparable worth beyond price, if of imperfect rationality. However, it is easy to be misled if Yania's higher cognitive powers are unduly emphasized at the expense of recognizing that the exercise of those powers presupposes that Yania is alive, and not drowned. Before anything else, in this sense, the case is a matter of life and death.¹⁹³ If Yania is to continue to exercise the powers and capacities of personhood, he must still be alive.

This is not to deny Kant's account of the moral value of a person. It is merely to point out that there must be a person who remains alive to continue to exercise the higher Kantian capacities. In our revised hypothetical, Bigan must save Yania if Yania's valuable capacities are to be saved.

Under our revised circumstances, it would violate a Kantian moral duty for Bigan to refuse to save Yania without some adequate excuse. The problem is that it cannot be assumed that all moral duties can and should be legally enforced on every occasion.¹⁹⁴ Not all of the differences between law and morality will be crucial in all cases. The law, for example, cannot force Bigan to rescue Yania with just the right motive.¹⁹⁵ But about this, one can safely assume that Yania is largely indifferent, so long as the rescue goes ahead successfully. The motive of the rescuer, whatever its moral value, is unlikely to loom large to the rescued.

Crucially, the law may take proper account of both the complex, multi-faceted, actual *Yania*-type situations, and of the revised simplified context as well. The law may sensibly take all the possible complications under consideration—the impossible calculations, the dangers to a rescuer, administrative costs, moral hazards, the diffusion of responsibility, costs to rescuers, the uncertainties, and even the incentive effects on good swimmers to avoid

193. For discussion, see ROSEN, *supra* note 189, at 207 (defining survival, or life itself, as presupposed by higher values, including liberty).

194. See, e.g., KANT, *METAPHYSICS*, *supra* note 5, at 22 (“[Moral] duties of benevolence, even though they are external duties (obligations to external actions), are still assigned to ethics (as opposed to enforceable positive law) because their lawgiving can only be internal.”).

195. See *id.* at 21 (explaining that juridical or positive “lawgiving does not require that the idea of this duty, which is internal, itself be the determining ground of the agent's choice”).

water—and may refuse to establish a general legal rule of rescue.¹⁹⁶

That does not mean, however, that the law should not impose a legal duty to rescue for cases as recognizably simple and clear as our revised hypothetical. Likewise, it certainly does not mean that the law cannot require “benevolent” acts in general, whether such acts are really motivated by benevolence or not.¹⁹⁷ The law can require rescues even if the rescuer is motivated solely by fear of punishment for noncompliance. For Kant, this is because the positive, juridical law is instrumental to¹⁹⁸ and constrained by¹⁹⁹ the Kantian moral law. After all, in the absence of Kantian freedom and autonomy people would, according to Kant, merely be fancy mechanisms or complex natural objects, and there would be little reason for the law not to subtly manipulate us as objects.²⁰⁰

Clearly, Kant wishes to emphasize individual freedom of choice, individual liberties, and pursuing one’s own happiness

196. For discussions of some of the main complications, see, e.g., Samuel Freeman, *Criminal Liability and the Duty to Aid the Distressed*, 142 U. PA. L. REV. 1455, 1473 (1994) (referring to a Kantian “perfect juridical duty of commission” to relieve emergency distress if we can do so at little risk and inconvenience); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673, 705–06, 746 (1994) (seeking to develop a Kantian legal duty of individual rescue, where the broader community cannot itself act, based on a Kantian social-contractarian/communitarian obligation to preserve persons through providing necessary sustenance, etc.); Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 606–08 (2001) (arguing for the limited significance of the problem of limiting liberty, as opposed to broader cost considerations); Eugene Volokh, *Duties to Rescue and the Anticooperative Effects of Law*, 88 GEO. L.J. 105, 106–07 (1999) (discussing several more specific variants among good and bad Samaritans); Jeremy Waldron, *On the Road: Good Samaritans and Compelling Duties*, 40 SANTA CLARA L. REV. 1053, 1056–57 (2000) (emphasizing the possible justifiability of legal duties in this context, without relying on communitarianism or merely abstract universalism); Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980) (arguing that a judicially created duty to rescue can be justified based on an already-existing pattern of morality in the common law); Richard A. Epstein, *Rights and Rights Talk*, 105 HARV. L. REV. 1106, 1117–18 (1992) (reviewing MARY ANN GLEDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991)) (noting the various enforcement and administrative costs associated with making some failures to rescue a crime or tort).

197. Cf. KANT, *METAPHYSICS*, *supra* note 5, at 22 (emphasizing ‘benevolence’ in a sense including an appropriate motive, as opposed to merely doing the benevolent thing, from whatever motive); see also ROSEN, *supra* note 189, at 179 (discussing both private citizens’ and the government’s duties of benevolence).

198. See PATRICK RILEY, *WILL AND POLITICAL LEGITIMACY: A CRITICAL EXPOSITION OF SOCIAL CONTRACT THEORY IN HOBBS, LOCKE, ROUSSEAU, KANT AND HEGEL* 128–29 (1982). A moral duty not to murder hardly rules out the possibility that a no-murder rule should also be enforced at law.

199. See *id.* at 128.

200. See *id.*

generally in his or her own way.²⁰¹ Such individual freedom imposes limits upon what governments can legally require. It cannot be assumed that these considerations, along with all the problems associated with real-world rescue adjudication, could not leave Kant with something like the general American no-rescue rule.²⁰² This is a matter of some moral and empirical complexity.²⁰³

Critically, it may be morally permissible, or even required, for a government to legally require citizens to contribute directly or indirectly to the essential well-being of others. In some cases, there may be no real difference between a government's imposing a direct legal obligation on some or all citizens, and the government's supplementing private charity through compulsory taxation.²⁰⁴

Whatever a Kantian government may legitimately require about rescues by private parties, it was noted in Part II that Kant endorses the more indirect, more collective "rescue" of persons in the form of tax-financed redistribution to the least well-off. It is to the elaboration of this crucial theme that this article now turns.²⁰⁵

201. See KANT, *METAPHYSICS*, *supra* note 5, at 30 (explaining the innate right of freedom and independence consistent with like rights for others); *id.* at 151 (explaining that the duty to promote the happiness of others is largely constrained by their own preferences).

202. See, e.g., *Miller v. Arnal Corp.*, 632 P.2d 987, 990 (Ariz. 1981) ("[T]he law presently imposes no liability upon those who stand idly by and fail to rescue a stranger who is in danger."). There are, of course, exceptions and statutory limitations. See *id.* For a recent repudiation of the majority rule, in dicta, see *Wicker v. Harmony Corp.*, 784 So. 2d 660, 664 (La. Ct. App. 2001) ("[A] person who observes a person in obvious peril should be required to render assistance when he can do so without personal risk."). The Vermont rescue statute requires reasonable assistance under specified circumstances. VT. STAT. ANN. tit. 12, § 519(a) (1973).

203. Kant is certainly sensitive to practical problems in implementing what may seem like sound general rules. See, e.g., KANT, *METAPHYSICS*, *supra* note 5, at 156 (recognizing moral indeterminacies at least at the level of particular cases, if not at the level of principles, and the need for moral judgment in cases of charity and sacrifice).

204. See *id.* at 101 for Kant's discussion of compulsory poor support. Certainly, requiring person A to rescue person B differs in some respects from the government's allocating a portion of A's taxes to fund rescue personnel. It is difficult, however, to see a legal requirement that we warn the blind of an imminent, disastrous misstep, or that we annually cook some sort of dinner for distribution to the hungry, as so much more personally intrusive and autonomy inference-laden as to make our tax contributions seem qualitatively less by comparison. Paying a tax obviously leaves one with less discretion and autonomy as well.

205. See *id.* at 202-03.

F. *A Formula-of-Ends Approach to Welfare and Educational Systems*

As devoted as he was to individual liberty,²⁰⁶ Kant's recognition of the status of all persons as ends in themselves leads naturally to his conclusion that governments can and should tax the wealthy in order to provide for the most basic natural needs, including sustenance itself, of those unable to provide for themselves.²⁰⁷

Kant's own explicit logic is contractarian, but his underlying logic should be one of universality, reason, and intrinsic worth. Kant, referring to a hypothetical social contract, says explicitly:

The general will of the people has united itself into a society which is to maintain itself perpetually; and for this it has submitted itself to the internal authority of the state in order to maintain those members of the society who are unable to maintain themselves. For reasons of state the government is therefore authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs. The wealthy have acquired an obligation to the commonwealth, since they owe their existence to an act of submitting to its protection and care²⁰⁸

This provision sounds rather minimalist on its face. Beyond the literal minimalism, though, lie the passage's ambiguities.

The quoted passage is minimalist in that its focus seems to be on sheer survival, or at least compatible with fulfilling the most necessary natural needs. Certainly, Kant is not writing in a period of enormous technological and economic productivity with oceans of dispensable consumer goods.²⁰⁹ Perhaps Kant intends this passage to set only a minimum floor. However, it is written with a focus on providing, not so much for the rational capacities

206. See *id.* at 24 ("Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."); *id.* at 30 ("*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.").

207. See *id.* at 101.

208. *Id.* To evaluate the influence of Rousseau on Kant and on his terminology, see generally JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., Penguin 1972) (1762).

209. See JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* (4th ed. 1984).

or the truly human, but for providing for humans at a level not really much above the animal.

There is also the ambiguity of who, within the community, is really to be provided for, and whether the obligation stems from a sense of fairness and obligation by the rich, or from mere reasons of state. One might well assume that everyone who genuinely cannot provide for their most basic necessities would qualify for government assistance.²¹⁰ However, Kant seems to hint that merely maintaining society, or social stability, is really the underlying aim. Perhaps for reasons of state, no provision by the state need be made to those unfortunately destitute and who are no longer able, in any way, to threaten social stability. Those who are both unable to work and unable to threaten social stability can be left to private charity. Perhaps Kant is assuming that, at least indirectly, all those who need state welfare, including the helpless and infirm, can somehow threaten social stability.

This may be as far as Kant's hypothetical social contract theory can carry the argument for legally-backed redistribution in favor of the least well off. In any case, the logic of Kant's own basic moral concepts actually carries further into the legal or juridical realm than Kant seems to allow.

In our world, the things that Kant values most highly require various kinds of assistance if they are to be uniformly developed and preserved. The potential for rational decision-making, for testing the universalizability of possible moral principles, the exercise of moral judgment, autonomy itself, and the dignity associated with these capacities do not necessarily flourish without governmental assistance. Taxation or other forms of coercion underlying such governmental provisions do not necessarily mean that someone's rights have thereby been violated. Kant himself might grant at least this.²¹¹

The most fundamental reason why taxing one person to support another need not violate the first person's rights is a matter of each person being equally an end in his or her own right, and of

210. For a strikingly less restrictive alternative conception, setting no requirement of reasonable effort to be or become productive for the receipt of an unconditional income grant from the government, see generally WHAT'S WRONG WITH A FREE LUNCH? (Philippe Van Parijs et al. eds., 2001); Philippe Van Parijs, *Why Surfers Should Be Fed: The Liberal Case for an Unconditional Basic Income*, 20 PHIL. & PUB. AFF. 101 (1991).

211. See KANT, METAPHYSICS, *supra* note 5, at 101.

incomparable value. The government cannot treat taxpayers merely as means to the good end of preserving and promoting the basic capacities of others. However, those who are most able to pay, within some vague limits,²¹² are under a moral duty to do so. Within limits, they have no moral right to refuse when required to do so.²¹³ Kantian political freedom cannot be read to override our genuine, fundamental, preexisting moral duties where those duties apply.

We have seen that not every instance of moral duty should be translated into a coercive law.²¹⁴ Some core moral requirements should, however, with great prudence, be translated into positive law. What we might call the socially available material and cultural bases of developing and preserving Kantian personhood, with equal consideration for all persons, should be made widely available. If necessary, this wide, if not universal, availability should occur through the enforcement of law.

Nature, a functioning economy, and private charity may not ensure that the material and cultural bases of developing and preserving personhood are widely available. Affirmative steps of various sorts may be needed if we are to preserve and promote our autonomy and our latent capacity for rational moral choice.²¹⁵ The well off among us cannot claim that their own developed capacity for autonomy is important, but that the same capacity in the least well off is not.²¹⁶ Kantian capacities are something that are common to us,²¹⁷ though developed to different degrees and in different ways in all of us.

212. See *id.* at 156.

But I ought to sacrifice a part of my welfare to others without hope of return, because this is a duty, and it is impossible to assign determinate limits to the extent of this sacrifice. How far it should extend depends, in large part, on what each person's true needs are

Id.

213. See *id.*

214. For the complexities of enforcing a moral duty to rescue, see *supra* Part IV.E.

215. See GUYER, *supra* note 43, at 131 ("[S]teps must be taken to preserve our potential for free choice and action and to enhance the conditions under which we exercise our agency.").

216. See *id.* at 149 ("[O]ne . . . has a duty to do what one can do to advance the successful exercise of rational agency in oneself and others"); see also *supra* notes 163–64 and accompanying text.

217. This equality is, of course, paralleled by Kant's equal concern for others and for oneself in the formula of ends. See *supra* text accompanying note 1.

Kantian governments need not infringe upon anyone's moral rights, nor act paternalistically toward the least well off, when they coercively tax in order to promote the basic well-being, dignity, and autonomy of the least well off.²¹⁸ While autonomy itself cannot be simply transferred or given intact by private benefactors or by a government, the necessary material and cultural bases of autonomy can and should be transferred.²¹⁹

Certainly, some people will resist the idea of a moral and legal duty to non-paternalistically assist those who lack the basic requisites for developing their rational capacities. Charles Dickens wrote of the mixed feelings toward "the multitude of Coketown, generically called 'The Hands,'—a race who would have found more favour with some people, if Providence had seen fit to make them only hands, or, like the lower creatures of the sea-shore, only hands and stomachs."²²⁰

Even if the government cannot directly alter such attitudes, it properly implements the formula of ends when it uses tax funds to promote the formula of ends in practice.²²¹ Of course, just as private individuals must exercise some discretionary judgment in carrying out their moral duty of sacrifice for the benefit of others,²²² so governments must recognize some reasonable limits on the scope of promoting dignity and autonomy through taxation. Even if, as Kant imagines, the capacity for human development is

218. See ROSEN, *supra* note 189, at 204–06. Making basic opportunities for rational choice available to the poor should not count as any sort of paternalism. See *id.* at 196. Rather, introducing such basic opportunities available to those who previously lacked them may reasonably be said to be crucially liberating. One could at worst say that only now, with the capacities for Kantian choice fully in place, could the conflict between paternalism and the exercise of their own autonomy even arise for such persons.

219. Cf. RAWLS, *supra* note 12, at 234. Rawls refers to a Kantian need "for those conditions necessary to develop and exercise our capacity for rationality in order to advance our happiness," whatever that conception of happiness may be. *Id.* (citing HERMAN, *supra* note 15, at 55–72).

220. DICKENS, *supra* note 81, at 52. By contrast, consider the sensible observation of Professor David Braybrooke that "[p]eople can function without derangement even at work that is far from satisfying. All along, however, it is indispensable to their full development that they have opportunities at work to enlarge their views, test their talents, and attain a sense of significant accomplishment." DAVID BRAYBROOKE, *MEETING NEEDS* 249 (1987).

221. See ROSEN, *supra* note 189, at 191–92.

222. See KANT, *METAPHYSICS*, *supra* note 5, at 156. "How far should one expend one's resources in practicing beneficence? Surely not to the extent that he himself would finally come to need the beneficence of others." *Id.* at 202. Some fixed rules in this regard might also encourage moral complacency, which Kant wants us to avoid. See MARCIA W. BARON, *KANTIAN ETHICS ALMOST WITHOUT APOLOGY* 41–43 (1995).

itself limitless,²²³ the proper scope of taxation to support the development of such capacities is not.²²⁴

Promoting the rational capacities of human beings requires not only the materials for a minimally civilized life, but opportunities for an appropriate education. Education is closely linked to rational development, the exercise of autonomy, and the fullest expression of human dignity. Treating all persons as ends in themselves requires the provision of educational opportunities, at public expense if necessary.²²⁵ Given the crucial status of one's rational capacities and the ability to arrive at moral principles in particular, it is not surprising that Kant regards education as of central importance.

Kant is explicit on the status of education:

A man may postpone for himself, but only for a short time, enlightening himself regarding what he ought to know. But to resign from such enlightenment altogether either for his own person or even more for his descendants means to violate and to trample underfoot the sacred rights of mankind.²²⁶

Education for Kant is not merely a matter of individual sacred right. Just as we, individually and collectively, are in this crucial respect to treat one another as ends in ourselves, so nature herself seems to intend the flourishing of human rational capacities. Kant writes that "[t]he history of mankind could be viewed on the whole as the realization of a hidden plan of nature to bring about an internally, and for this also externally, perfect constitution;

223. Hannah Arendt writes that for Kant, "[t]he human species is distinguished from all animal species not merely by its possession of speech and reason but because its faculties are capable of indeterminable development." HANNAH ARENDT, *LECTURES ON KANT'S POLITICAL PHILOSOPHY* 59 (Ronald Beiner ed., 1982).

224. For private sphere morality, Kant recognizes that the true needs of the benefactor must be considered along with those of the recipient. See KANT, *METAPHYSICS*, *supra* note 5, at 156.

225. See ROSEN, *supra* note 189, at 193 (noting that, for Kant, the state should "bear the expense of educating its subjects"); see also IMMANUEL KANT, *Idea for a Universal History with Cosmopolitan Intent*, in *THE PHILOSOPHY OF KANT: IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS* 116, 126 (Carl J. Friedrich ed. and trans., Random House 1949) (1784) (referring critically to military rather than public educational spending).

226. IMMANUEL KANT, *What Is Enlightenment?*, in *THE PHILOSOPHY OF KANT: IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS*, *supra* note 225, at 132, 137. Even more basically, Kant argues that "[m]an can only become man by education. He is merely what education makes of him." IMMANUEL KANT, *EDUCATION* 6 (Annette Churton trans., U. Michigan Press ed., 1960) (1803).

since this is the only state in which nature can develop all faculties of mankind."²²⁷

It would be tempting to imagine that Kant's relevance in this respect has been eclipsed. Twenty-first Century schools are typically unlike Eighteenth Century educational systems and practices. Have we not by now faithfully and fully implemented Kant's strictures on the importance of education, publicly funded where appropriate?

In fact, there is today an enormous gulf between Kant's vision of the universal development of human rational capacity and autonomy through education and the astonishing state of disrepair—the almost Dantesque conditions—of some of our public schools. The Kantian vision cannot be implemented by concentrating our supportive cultural and economic forces on favored schools, while the rest either scramble at the margins or fall into nightmarish conditions. Too often, our schools are dramatically lacking in those material and cultural prerequisites to the development of Kantian autonomy that could be publicly provided.

Beyond the endlessly debated disparities in public funding among school district lie, within some schools, abject squalor and depredation at the most concrete level. The typical impact of such conditions on the development of Kantian autonomy, and its incompatibility with genuine Kantian respect for persons and their potential, is similarly undeniable.

Consider briefly the report of the former schoolteacher Jonathan Kozol on his tour of a limited number of some of our worst public school facilities.²²⁸ Kozol reports repeated instances of taxis refusing to take him to a particular school;²²⁹ cases of lead poisoning among students detected too late to prevent permanent brain damage;²³⁰ students in constant, long-term pain from bleeding gums, or impacted or rotting teeth;²³¹ raw sewage flowing throughout the school, including the cafeteria;²³² chronic lack of

227. KANT, *supra* note 225, at 116, 127.

228. JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991).

229. *See id.* at 5.

230. *Id.* at 11.

231. *Id.* at 20.

232. *Id.* at 23. Cf. DANTE ALIGHIERI, *THE INFERNO* Canto VI, Circle 3, at 66 (John Ciardi trans., New Am. Library 1954) (1314) ("[D]irty water, and black snow/pour from the

the most basic educational materials;²³³ class hours spent regularly doing basic room cleaning;²³⁴ classes with no teacher present; or where no teaching is being attempted;²³⁵ or where the teacher is sleeping in class;²³⁶ four of six toilets non-functional, and others seatless;²³⁷ numerous school window frames with no glass;²³⁸ urinals detectable from one hundred feet away;²³⁹ library books sprouting mold;²⁴⁰ ceiling paint chips continually falling like snow;²⁴¹ cracking blackboards literally too dangerous to use;²⁴² virtual indoor waterfalls from leaking ceilings;²⁴³ substantial holes in the floor;²⁴⁴ wild mushrooms growing on the floor;²⁴⁵ classrooms with more children than desks;²⁴⁶ classes held in bathrooms;²⁴⁷ a fire alarm that has remained non-functional for twenty years;²⁴⁸ and dead rats found in the school cafeteria.²⁴⁹

One may believe that these sorts of public school conditions are somehow rare, that they can be overcome by some individual students, that they really do not make much difference, or that they are in a way consented to by the affected communities, that there is nothing that can realistically be done, or that it would be unfairly redistributive to remedy these nightmarish conditions. Cer-

dismal air to putrefy/the putrid slush that waits for them below.”).

233. See KOZOL, *supra* note 228, at 24.

234. *Id.* at 27.

235. *Id.* at 33, 69.

236. *Id.* at 52.

237. *Id.* at 36.

238. *Id.*

239. *Id.* at 37.

240. *Id.* at 53.

241. *Id.* at 99.

242. *Id.*

243. *Id.* at 100.

244. *Id.*

245. *Id.* at 105.

246. *Id.* at 111.

247. *Id.* at 114.

248. *Id.* at 140.

249. *Id.* at 182. For a less vividly expressed but in other respects parallel tour, see PAULO FREIRE, *PEDAGOGY OF FREEDOM: ETHICS, DEMOCRACY, AND CIVIC COURAGE* (1998), stating:

On my first visits to the [Sao Paulo] city schools, I saw the calamity with my own eyes and I was terrified. The whole system was a disaster, from the state of the buildings and the classrooms to the quality of the teaching. How was it possible to ask of the children the minimum of respect for their material surroundings when the authorities demonstrated such absolute neglect of and indifference to the public institutions under their care?

Id. at 48.

tainly, it is difficult to believe that such school conditions can be separated from the difficult circumstances and limited opportunities of the broader deprived community.²⁵⁰ All of this is beside the point; the Kantian dignitary agenda was plainly not completed with the close of the Enlightenment, or even with whatever faddish programmatic, structural, or administrative reforms may be currently popular. The Kantian dignitary agenda is, in the absolutely central area of education, as yet unfulfilled.

In such schools, it is difficult for observers to avoid something like basic Kantian considerations in assessing the situation. For example, one school counselor has remarked:

It's quite remarkable how much these children see. You wouldn't know it from their academic work. Most of them write poorly. There is a tremendous gulf between their skills and capabilities. This gulf, this dissonance, is frightening. I mean, it says so much about the squandering of human worth²⁵¹

Kant's central focus is on the opportunity to transform mere latent potential into flourishing competencies. As long as the Kantian vision remains unfulfilled, and human worth is squandered,²⁵² Kant's formula of ends remains a radical insight and a radical agenda, and not an achievement of the late Eighteenth Century revolutions.

Regardless of whether the offspring of an economically advantaged group of taxpayers is especially talented, many of those taxpayers prefer to provide their offspring with the largest educational and career advantages possible.²⁵³ Groups with an economic advantage can tolerate real inefficiencies in educational and career sorting unless the overall societal well-being level begins to suffer significantly. Advantaged groups may gain more by artificially and arbitrarily privileging their own offspring—whatever the latter's talents—than they lose from the overall general welfare losses stemming from limiting the opportunities of others.

250. See KOZOL, *supra* note 228, at 123; see also Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 553 n.21 (1992).

251. KOZOL, *supra* note 228, at 105.

252. See *id.*

253. For discussion of some tradeoffs between family advantage and equal opportunity, see generally JAMES S. FISHKIN, *JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY* (1983).

Kant reminds us of the moral arbitrariness of taking advantage of wealth differentials in this way. Kant notes that "in doing good to the poor, we are only doing our duty. For the inequality of man arises only from accidental circumstances—if I possess wealth, to what do I owe it but to the laying hold of circumstances favourable to me or my predecessors."²⁵⁴ According to Kant, there is no right to withhold the social and material requisites of dignity, particularly in the educational sphere. As contemporary educational theorist Paulo Freire argued, "[r]espect for the autonomy and dignity of every person is an ethical imperative and not a favor that we may or may not concede to each other."²⁵⁵

Kant recognizes that this Enlightenment project may require special public provision; however, he is flexible as to how the broad educational project is best carried out institutionally.²⁵⁶ For example, Kant wonders whether education at home or public education is more advantageous.²⁵⁷ He concludes that "from the point of view of developing ability, [and] also as a preparation for the duties of a citizen, it must, I am inclined to think, be allowed that, on the whole, public education is the best."²⁵⁸

V. A FINAL PROBLEM: THE VALUE OF THE GOOD WILL VERSUS THE VALUE OF DOING THE RIGHT THING

Above we have discussed governmental provision of the material and cultural prerequisites to Kantian dignity and autonomy, or to developing into an end in oneself. Government provision, however, is typically a matter of coercing, if only through taxation, the assistance of taxpayers. It is possible to pay one's taxes with no regard for duty, or even with resentment. This might not unduly trouble us, were it not that Kant famously emphasizes the moral status of the good will.

254. KANT, EDUCATION, *supra* note 226, at 105.

255. See FREIRE, *supra* note 249, at 59.

256. See *supra* note 225 and accompanying text.

257. See KANT, EDUCATION, *supra* note 226, at 25.

258. *Id.* at 25–26; cf. AMY GUTMANN, DEMOCRATIC EDUCATION (1987) (discussing the value of publicly funded and publicly responsible schools emphasizing the capacity for democratic deliberation); JOHN STUART MILL, ON LIBERTY 97–99 (David Spitz ed., W.W. Norton & Co. 1975) (1859) (discussing the legitimate role of taxation in supporting the education of the poor). Note that the Supreme Court has refused to recognize any general federal constitutional right to some minimum quality or quantity of education. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 57–59 (1973).

Kant writes, in particular, that “[i]t is impossible to think of anything at all . . . that could be considered as good without limitation except a good will.”²⁵⁹ Further, “[a] good will is not good because of what it effects or accomplishes”²⁶⁰ Consider, however, the possible states of mind of the taxpayer who is legally coerced by the government into contributing to the status of others as ends in themselves. Such a taxpayer may be resentful, unaware of any real consequences of his or her contribution, or indifferent to moral duty.

Should we infer that a society should try to promote severely deprived persons into flourishing ends in themselves only through voluntary means, such as private charity? Of course, some people even donate to a charity for reasons of no Kantian moral value. Perhaps it can be assumed that people typically donate to charity with a morally better, duty-oriented state of mind than when we pay our tax bill. Doubtless it is often difficult, or even impossible, to tell if someone has acted on the basis of a good will or not.²⁶¹ However, we must admit the apparent difference between a morally backward taxpayer and a charitable donor who sees his or her contribution as a Kantian moral duty owed toward a moral person as an end in his or herself.

Still, there is no sufficient reason to put an end to taxation for the sake of developing personhood in others, as long as we believe that personhood can often be more adequately promoted through taxation than by relying on voluntary charity. In the case of education, for example, providing young children with a real opportunity to become genuine Kantian persons in the fullest sense is obviously of enormous Kantian moral weight. In such a case, society is helping to promote the very capacities needed for a Kantian good will in the children benefited. Regardless of the motive, taxes may make possible what Kant takes to be the enormously, morally significant transformation into a fully developed moral person. Without taxes, presumably, this process occurs less often, or at least to a lesser degree. Coercing the payment of taxes may result in payment with something less than a good will, from duty alone.²⁶² Surely the substance of such a less-than-good will, and

259. KANT, *GROUNDWORK*, *supra* note 1, at 7.

260. *Id.* at 8.

261. *See id.* at 19–20.

262. *See id.* at 10–12.

even resentment of or indifference toward the deprived, often preexist the demand by the tax collector.

It is possible that making support of basic genuine education voluntary would change many persons' moral outlook from malice or indifference to a new, more responsible seriousness toward what Kant regards as a moral duty.²⁶³ This might amount to a valuable gain in good will. It is just as easy to argue, however, that taxation for basic education calls attention to the moral importance of such an educational opportunity, and prompts some persons to recognize that moral importance and their own moral duty.

Part of the problem may lie in the fact that we use terms such as "respect" in both a subjective and an objective sense. A person who contributes to another's basic genuine education only with contempt from fear of punishment, or from arbitrary sentimentality, may not have respect for the beneficiary in the subjective sense of respect. However, there is also an objective sense of respect. In this sense, consciously providing for the development of another's moral personality is to respect that developing person.

Kant places enormous moral value on even the objective sense of respect, as even this form of respect promotes the development of at least the beneficiaries' moral personhood, and the status of the beneficiaries as ends in themselves. Certainly, the severely deprived would prefer to be treated with respect in both the objective and subjective senses. Resentment on the part of the better-off can be sensed. Given the choice, however, we may easily conclude that the beneficiaries of taxation would typically prefer being given the prerequisites for flourishing as ends in themselves even by taxpayers indifferent to their moral duty rather than receive much less under a voluntary but less adequate system.

There may be morally conscientious taxpayers who are disturbed by the fact that the compulsoriness of their tax payments obscures their good Kantian motives. They may really be motivated by their recognition of moral duty, but others may believe that they are motivated, at least in part, by fear of punishment. Thus, they may deserve, but not receive, moral credit.

263. See *supra* Part IV.F.

We can be sympathetic to such persons, but we should not accommodate their concerns to the extent of making the support of education entirely voluntary. Even where there is tax support of education, additional voluntary opportunities to contribute money, time, or talent are typically available. If one wishes merely to test one's good will, one can accept these additional opportunities. If one wishes public credit for one's good will, one can volunteer in an especially public manner.²⁶⁴

VI. CONCLUSION

This essay has shown that the basic Kantian concern for the value of persons as ends in themselves continues to carry important critical weight. The basic Kantian project remains unfulfilled. This is true not just for morality, but for the law as well, especially in the vital realm of welfare and education law. Of course, as Kant recognizes,²⁶⁵ no broad formula, including the formula of ends, can be applied without intelligence, good faith, and sensible judgment. However, society has been able to make important, critical use in the law of Kant's formula of ends while minimizing the relevance of typical criticisms of Kant.²⁶⁶

It is possible to differ, particularly over many details of the educational policy that best reflects proper government enforcement of the imperative to respect and nurture the developing status of young persons as ends in themselves. Educational problems in our society certainly cannot be addressed by the schools alone. Experimentation, rather than dogmatism, is called for. With these disclaimers in place, however, it remains undeniable that our present law of school operation and funding, at the fed-

264. For further development of some of these voluntariness themes, see Murphy, *supra* note 196, at 643 n.179 (2001).

265. See KANT, *METAPHYSICS*, *supra* note 5, at 156, 202.

266. See, e.g., 1 ARTHUR SCHOPENHAUER, *THE WORLD AS WILL AND IDEA* 450 (Haldane & Kemp trans., Kepan, Paul, Trench, Traubert & Co., 7th ed. 1909) (1898) (criticizing Kantians for adhering to a proposition that is "an exceedingly vague, indefinite assertion, which reaches its aim quite indirectly, requires to be explained, defined, and modified in every case of its application and, if taken generally, is insufficient, meager, and moreover problematic"); Izhak Englard, *Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1922 (2000) (referring to Kant's formulations of the categorical imperative as "empty formula[s]"); Robin L. West, *Are There Nothing But Texts In This Class?: Interpreting the Interpretive Turns in Legal Thought*, 76 CHI.-KENT L. REV. 1125, 1160 (2000) (referring to "the super-rationalism of Kant").

eral and state constitutional and statutory levels, plainly violates the status of many students as actual or potential Kantian ends in themselves. The most basic Kantian principles are, thus, not simply our inherited legacy, but an unmet challenge.